

# **Revenue Income vs Capital Receipt**

**The validity of the basis for taxing receipts from mining operators in the hands of landowners.**

By

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## CHAPTER 1: INTRODUCTION

### 1.1 Introduction/Overview:

The distinction between whether a receipt or accrual is of a capital nature or not, is decisive when considered for tax purposes. If it is of a capital nature it will be taxed differently to a receipt or accrual which is not of a capital nature (revenue nature).

The definition for gross income in s 1 of the Income Tax Act 58 of 1962 (the ITA), reads: “... in the case of a resident, the total amount in cash or otherwise, received by or accrued to or in favour of such resident ... excluding receipts or accruals of a capital nature”. The result is that capital receipts are specifically excluded from the description and therefore not subjected to income tax under this definition.

Capital receipts were entirely excluded from the scope of income tax up until the introduction of Capital Gains Tax (CGT) in 2001. Since October 2001, capital receipts became taxable under section 26 read together with the Eighth Schedule of the ITA. The Eighth Schedule deals with the calculation of a capital gain or loss and, depending on the status of the taxpayer, a portion of the gain is included in taxable income.

The distinction between capital and revenue is one which is important to both taxpayer and tax authority alike. Capital gains attract a lower effective rate of tax than revenue income, depriving the tax authority of tax revenue. Prior to the introduction of capital gains tax in South Africa, capital gains attracted no tax liability at all and the disparity was even wider.<sup>1</sup> The result of capital receipts enjoying a more favourable treatment than a receipt on revenue account, has led to many taxpayers seeking the more beneficial classification of receipts being capital as opposed to revenue.

This disparity in treatment is also the reason for many divergent views between taxpayer and tax authority when the classification of the income as capital or revenue

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<sup>1</sup> Naidoo, K. (2013). The Importance of the Capital versus Revenue distinction in determining Gross Income and the Effect this distinction has on the Maxims of Taxation. Postgraduate Diploma Tax Law. UCT

is to be decided. This is particularly the case in respect of income generated from mining activities and in particular the mining of sand.

The South African mining industry has played a critical part in the country's economy ever since the discovery of gold in the Witwatersrand in 1884<sup>2</sup>. Mining had an unparalleled effect on South African history and in the process South Africa became the largest gold-producer on the international market.<sup>3</sup> South Africa held this position until 2006, when it was surpassed by China.<sup>4</sup>

The mining activities in the Western Cape of South Africa are somewhat different to that of the more valuable commodities in other regions, but the tax challenges remain the same. The classification of receipts by landowners came under scrutiny when the attention of the Commissioner was focused on this sector during the 1980's and 1990's. A surge of cases were brought before the courts, with the classification of receipts in the hands of the landowners as the main focus.

This study reconsiders the common facts of selected cases, the classification principles applied, the consequences of the classification and makes recommendations as to the validity of these principles (based on the common fact pattern) on common day transactions of similar sort to achieve a tax efficient result.

## 1.2 Objectives and Approach:

The core subject of this study focuses on the classification of receipts by landowners from mining operations. A revisit of the cases heard by the courts on this subject will form the initial premise to this study. The principles laid down will be identified and

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<sup>2</sup> SAHO, (2016). South African History Online. [online] Available at: <http://www.sahistory.org.za/discovery-gold-1884> (Accessed 16 March 2016)

<sup>3</sup> Wikipedia, (2016). List of Countries by gold production. [online] Available at: [https://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_gold\\_production](https://en.wikipedia.org/wiki/List_of_countries_by_gold_production) (Accessed 14 June 2016)

<sup>4</sup> Mining Technology, (2013). The top 10 gold producing countries. [online] Available at: <http://www.mining-technology.com/features/feature-ten-largest-gold-producing-countries-china/> (Accessed 14 June 2016)



analysed using these cases as the benchmark, being Ernst Bester Trust<sup>5</sup>, Samril Investments<sup>6</sup> and Van Blerk<sup>7</sup>.

The principles derived from these cases relate unquestionably to the relevant facts pertaining to each case and the laws at that time. This research will investigate whether these principles remain relevant when considering the changes which the industry has undergone.

The research question therefore is whether the principles laid down in selected decided case law are still valid taking into account legislative and industry changes.

Relevant tax legislative amendments along with other legislative changes, since these court decisions, need to be identified and their impact assessed in accordance with the influence they may have on the classification of income in certain industries.

In order to address the research question relevant tax legislation introduced since the hearing of these cases, specifically Capital Gains Tax (CGT) in 2001 will be analysed and the effects, if any, it exerted on the status quo, as determined by legislation and case law, of the tax liability of taxpayers in the mining industry.

As far as “other legislative” changes are concerned, this study will include a discussion on the promulgation of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), in particular the sections that encompass the rights to minerals and the compensation relating to those rights.

The method to be followed is one of legal interpretative research using a doctrinal methodology. This method will enable a systematic exposition of the rules evidenced in certain case law and which will inform and evaluate on areas of difficulty and the adequacy of existing rules.

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<sup>5</sup> *Ernst Bester Trust v Commissioner for South African Revenue Service*. [2008] 70 SATC 151 (Supreme Court of Appeal of South Africa); 152

<sup>6</sup> *Samril Investments (Pty) Ltd v Commissioner for South African Revenue Service*. [2002] 65 SATC 1 (Supreme Court of Appeal of South Africa)

<sup>7</sup> *Commissioner for South African Revenue Service v Van Blerk* [2000] 62 SATC 131 (Cape of Good Hope Provincial Division of the Supreme Court of South Africa); 132

### **1.3 Limitation of Scope:**

The main research question relates to the classification of money flowing between participants in a transaction similar to that of the Ernst Bester Trust, Samril Investments & Van Blerk cases. This relationship involves a landowner, in these cases farmers, and mining operators, who perform the mining activities on the land. The money is paid from these mining operators to the farmers. This will be the only type of transaction examined in the dissertation.

The Mineral and Petroleum Resources Royalty Act No. 28 of 2008 (MPRR), falls beyond the scope of this study as it regulates the tariff payments between mining operator and the state. The MPRR governs the royalty payment, from mineral rights holder to state, and does not affect the relationship between landowner and mineral right holder.

### **1.4 Structure of the dissertation:**

Chapter 1 outlines the research focus by means of an introduction and setting the objectives and limitations.

Chapter 2 analyses the specific cases and concludes with the principles established by the courts.

Chapter 3 considers the impact of CGT and the Income Tax Act no. 58 of 1962 ("the ITA") and if these enactments will have an influence on already decided case law.

Chapter 4 details the history of mining law in South Africa and the development of the Mineral and Petroleum Resources Development Act, 20 of 2002 ("the MPRDA") and how relevant sections may impact or affect participants in the industry.

Chapter 5 will focus on the current position of the industry and how the MPRDA's introduction in 2002 has affected the mechanics of the industry.

Chapter 6 will serve as the concluding chapter. It will focus on the previous analyses and discussions in an attempt to answer the research question. Recommendations will be made to assist in areas of uncertainty, where the tax treatment of the specific type of transaction is concerned.

## CHAPTER 2: PRINCIPLES LAID DOWN IN CASES PAST

### 2.1 Introduction:

It is common understanding that capital receipts enjoyed, and still do, a more favourable treatment by tax legislation than revenue receipts. It is thus understandable that the ordinary taxpayer would prefer to have receipts classified as capital rather than revenue.

This attempt at a beneficial classification by the taxpayer in *the Commissioner for South African Revenue Service v Van Blerk*<sup>8</sup> (Van Blerk), is the main reason that led to the case being heard by the Cape of Good Hope Provincial Division of the High Court.

The respondent, Van Blerk, was a farmer who was approached by a Mr HJ van Biljon and later a company, Malan's Transport (Malan's TPT), for the purchase of the sand deposit located on his farm. The sand was paid for at a predetermined price per cubic metre, which price was to be escalated annually according to the agreement between the involved parties.

The income received by Van Blerk by way of this agreement, forms the basis of the dispute between the taxpayer and the tax authority. Van Blerk regarded the receipt as capital, whilst the Commissioner for the South African Revenue Service (the Commissioner) held the view that the receipt was in the nature of revenue.

In *Samril Investments v CSARS*<sup>9</sup> (Samril) the case followed a similar line of appeal and defence as in Van Blerk. The deciding factor in this case revolved around the contention by the appellant that the sale, forming the nucleus of this case, was the disposition of the right to acquire the sand and not a sale of the sand itself. In passing the judgement in the case, Hefer AP focussed on whether it was at all possible to

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<sup>8</sup> *Commissioner for South African Revenue Service v Van Blerk* [2000] 62 SATC 131 (Cape of Good Hope Provincial Division of the Supreme Court of South Africa); p133

<sup>9</sup> *Samril Investments (Pty) Ltd v Commissioner for South African Revenue Service* [2002] 65 SATC 1 (Supreme Court of Appeal of South Africa)

separate the “right to acquire” for “the sand deposit” itself. The Supreme Court of Appeal of South Africa (Supreme Court) heard the case on appeal from the Cape Income Tax Special Court (Tax Court) after the appellant was granted the necessary leave to appeal the decision by the Tax Court.

In the case of *Ernst Bester Trust v Commissioner for South African Revenue Service*<sup>10</sup> (Ernst Bester), it was once again the initial contention of the taxpayer that the receipts upon the sale of sand, is capital in nature.

The appellant in the case, the Ernst Bester Trust (Ernst Bester), was operating its farming activities as well as conducting its mining endeavours in the same region as Van Blerk, Currie of Samril<sup>11</sup> and others. This may suggest that the representation for Ernst Bester may have been well aware of the findings in the related cases before bringing their case in front of the court.

The submission above is probable as the appellant in the Ernst Bester case included an alternative argument, holding that in the event of the Commissioner finding that the receipts are revenue as opposed to capital, the appellant would be entitled to an opening stock deduction in respect of trading stock held by it at the beginning of each year.

## 2.2 The findings of the court in CSARS v Van Blerk:

The case involving Van Blerk and the Commissioner reached the Cape of Good Hope Provincial Division of the High Court (Cape Provincial Division), after the Tax Court found in favour of Van Blerk. Judge Traverso, chair of the Tax Court, predicated her judgement on a number of facts presented to the court and agreed upon, being:

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<sup>10</sup> *Ernst Bester Trust v Commissioner for South African Revenue Service*. [2008] 70 SATC 151 (Supreme Court of Appeal of South Africa); p152

<sup>11</sup> *Samril Investments (Pty) Ltd v Commissioner for South African Revenue Service*. [2002] 426/2001 (Supreme Court of Appeal of South Africa)

- 1) “There was a considerable quantity of sand on the farm which was suitable for construction purposes”;
- 2) “The sand was of such a nature that if it was removed it could not be replaced nor replenished”; and
- 3) “A removal of the sand from the farm resulted in a decrease in the value of the property”<sup>12</sup>.

The Commissioner was not convinced by the judgement and appealed to the full bench of the Cape Provincial Division, to re-examine and adjudicate the case.

A common thread throughout the hearing was whether the sale of sand constituted the sale of fructus or corpus of the land. Fructus being “produce| crops; fruit; profit; enjoyment; reward”<sup>13</sup> and Corpus being defined as “corporis: body, corpse”<sup>14</sup>.

The Commissioner contended that “while the sale of fructus (being the fruit) would invariably be of a revenue nature, the proceeds from the sale of corpus (being the body) would not inevitably stand to be classified as receipts of a capital nature”<sup>15</sup>.

The respondent contended that “he had sold his rights to the sand and that he had no involvement in the removal of the sand or in any of the activities for which the sand was utilised” and that “he had possessed no sand removing equipment which would have been indicative of a person engaged in a business of trading in sand and the only trade in which respondent had been engaged was that of farming”<sup>16</sup>.

“Judge Davis, in delivering the verdict in the case, relied on the following findings:

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<sup>12</sup> *Commissioner for South African Revenue Service v Van Blerk*. [2000] 62 SATC 131 (Cape of Good Hope Provincial Division of the Supreme Court of South Africa); 133

<sup>13</sup> JM Latin English Dictionaries (2008). Fructus. Available at: <http://www.latin-dictionary.org/> [Accessed 05 October 2016].

<sup>14</sup> Latin English Dictionary (AZAD) (2008). Corpus. Available at: <http://www.latin-dictionary.org/> [Accessed 05 October 2016].

<sup>15</sup> Ibid Van Blerk. 132

<sup>16</sup> Ibid. Van Blerk. 132

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- (i) That from the dictum in *Bourke's Estate v Commissioner for Inland Revenue* 53 SATC 86 it was possible to formulate the test to be applied here in this way: the proceeds of the sale are not to be determined by whether fruits or corpus had been sold but rather by means of an examination of the nature of the transactions and the intention with which they were undertaken by the taxpayer.
  - (ii) That while the principle as set out in *Glenboig Union Fire Clay Company Ltd v The Commissioner for Inland Revenue* 12 TC 427 has been accepted by our courts it was inapplicable to the facts of the present case in that the inquiry relates not to the legal classification of the thing sold that is whether it is part of the corpus, or constitutes a sale of fructus but exclusively to the nature of any business carried on by respondent in relation to such sand;
  - (iii) That in this case the record of the sales of sand, albeit to a single purchaser, had all the characteristics of trading in this commodity and respondent had employed his sand as his stock in trade: moreover, sand was sold on a regular basis over a number of years and in itself this was indicative of a taxpayer who had been engaged in a trade and had employed the sand in the nature of trading stock pursuant to a scheme of profit making;
  - (iv) That the fact that respondent did not advertise the sale of sand and that he did not sell sand to the general public but rather to one specific purchaser, was not sufficient to justify a conclusion that he had not embarked on a profit-making scheme employing the sand as trading stock;
  - (v) That, from the principle as laid down in *Bourke's Estate v Commissioner for Inland Revenue* 53 SATC 86, the key question for determination of a dispute such as in the present case was whether an owner of land who sells for profit a substance found on his land has engaged in a trade even though the substance may be a wasting asset so that its removal inevitably devalued the land;

- (vi) That it was apparent that when respondent bought the farm in 1983 he had employed it for two separate and distinct purposes, i.e. to employ the land in farming operations and to sell the sand thereon and the presence of the first of these two purposes would in no way detract from the significance of the second in relation to sand sales: the character of the sand, for purposes of determining whether the proceeds thereof were revenue or capital, must be determined by the respondent's intention in relation to the sand; and
- (vii) That the transactions in issue represented the proceeds of sales in which respondent had sought to employ a commodity which admittedly formed part of the corpus of his land for profit and in this he was successful and the repeated sales of sand in the manner undertaken by respondent had all the characteristics of ordinary trading in the commodity."

In summary of the outcome of this case: The tests applied in the judgement were to examine the *nature of the transactions* and the *intention with which the taxpayer undertook those transactions*. Upon examination of the transactions, the judge found that: The sale of sand had all the characteristics of a commodity being traded in; resulting in the sand being held as trading stock. He further judged that the taxpayer was acting in a manner pursuant to a scheme of profit making. None of the opposing considerations were significant enough to digress from this finding. Judges Selikowitz and Blignaut concurred with the verdict of Judge Davis in a unanimous decision in favour of the Commissioner.

### 2.3 Samril Investments v CSARS:

The appellant in the case derived income from the sale of building sand found on farmland it owned. The Commissioner including the income generated from the sale of the sand as part of the appellant's gross income when he assessed the appellant for income tax. After the appellant was unsuccessful in his objection against the assessment, on the grounds that the amount in question represents a capital gain, the appellant appealed to the Tax Court. The Tax Court dismissed the appeal and



confirmed the assessment by the Commissioner. The appellant was granted leave to appeal to the Supreme Court.

Judgement in the Supreme Court of Appeal was passed by Judge Hefer. The learned Judge followed up the facts with a meticulous representation of his findings.

He firstly alluded to the “usual test for determining the true nature of a receipt or accrual” as being “whether it constituted a gain made by an operation of business in carrying out a scheme for profit-making”. He supported this argument with reference to “the decision of this Court in *Commissioner for Inland Revenue v Pick`N Pay Employee Share Purchase Trust* 1992 (4) SA 39 (A) at 57E-G. He accepted that profit-making is also an element of capital accumulation as per Wessels JA in *Commissioner for Inland Revenue v Stott* 1928 AD 252 at 263.

He concluded the opening stanza with acknowledging that “Each case must be decided on its own facts with due regard to the distinction between capital and the income derived from the productive use thereof as described *inter alia* in *Commissioner for Inland Revenue v George Forest Timber Co Ltd* 1924 AD 516 at 522-523 and taking account of all the circumstances of the case.”.

Judge Hefer continued by referring to the then s82 of the ITA, which casts the burden of proof on the taxpayer when an amount is claimed to be exempted from or not liable to tax. He stating that “where the court is not persuaded on a preponderance of probability that the income derived from the sale of an asset is to be regarded as capital gain, it must be included in the taxpayer’s gross income.” This statement seems to suggest that, in situations where there is no clear indication that the receipt is one of capital, the decision will tend to go the way of revenue.

When it came to the matter of the present case, Judge Hefer encapsulated the dispute between the parties as one where; “the respondent submits that the appellant conducted the business of selling sand and that it did so in carrying out a scheme of profit-making” and “The appellant’s contention on the other hand is that it disposed

of the right to acquire the sand on Droëvlei in a single transaction which did not constitute the carrying on of a business". He further submitted that "Both parties rely for their contentions mainly on the terms of the written agreement in pursuance of which the sand was excavated and removed."

The agreement is held to be one plainly of purchase and sale, with the question being whether the subject matter is; the sale of sand or the sale of the right to the sand. Judge Hefer found no reason to support the view that the sale was a sale of right to the sand and upheld the Tax Court's view that the sale was a sale of the sand.

The closing question in the matter, was whether "the income derived from the sale of the sand falls to be classified as a gain made by the operation of a business for carrying out a scheme of profit-making"? Judge Hefer sustained the views of the president of the Tax Court and pointed to multiple payments being made over a two year period coupled with the understanding that "income was generated by exploiting the resources on what was admittedly a capital asset and was plainly designedly sought and worked for, affords at least *prima facie* evidence that it was in the nature of revenue and not capital."

It is unclear from the case material whether the representation for Samril deliberately ignored the findings of the Van Blerk case, which occurred prior to their own case being heard, as support to their own arguments or whether it was an omission without purpose.

In concluding his judgement, Judge Hefer recognised the appellant's contention that the removal of the sand was an effort to merely improve the land by removing an unwanted subsoil layer of sand. He regarded this evidence as unconvincing and dismissed the appeal with costs. All four associated judges concurred with the verdict.

## 2.4 The findings of the court in Ernst Bester Trust v CSARS:

The case revolves around the Commissioner's disallowance as a capital receipt, the income generated from the sale of sand. The taxpayer appealed against the assessment by the Commissioner to the Tax Court. Judge Davis sitting in the Tax Court dismissed the appeal and upheld the assessment by the Commissioner. He also rejected the alternative submission by the appellant that, in the event of finding against the allowance of the receipt as capital, the appellant would be entitled to an opening stock deduction in respect of the trading stock it held at the beginning of each year of assessment.

The appellant continued the appeal process and brought the matter before the Supreme Court, after being dismissed on both previous counts. Supreme Court Judge Hefer was again assigned to deliver the judgement in this case.

During the proceedings of the Tax Court, Judge Davis found no material evidence for allowing the appeal by the taxpayer on any of the two grounds put before the court. The contending views supposed by the Commissioner were upheld on both counts.

The nature of the sale of the sand was again deliberated over and referenced against Van Blerk and Samril Investments v CSARS<sup>17</sup>. These two cases were referred to as "neighbouring properties" in the judgement of Ernst Bester Trust.

The judgement by Judge Hefer concluded with the following views in support of the findings against the appeal by the taxpayer with regards to the question of the nature of sales:

(i) "amounts received by appellant from Brickrush represented gains made in the operation of an ongoing scheme of profit-making";

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<sup>17</sup> *Samril Investments (Pty) Ltd v Commissioner for South African Revenue Service*. 2003 SA 658

(ii) “there was a similarity of the parties’ arrangement to the terms of a mineral lease” and “the periodic payments made by the lessee to the lessor were of a revenue nature”;

(iii) “in the case of a mineral lease, the value of the land is diminished” yet “the owner’s compensation (being rent or royalties) was taxable and it did not matter whether the rent was a fixed recurrent amount or whether it was linked to the quantity of minerals removed or to the gross profits made by the lessee”;

(iv) “where the taxpayer permits another to enter his property and remove sand against a monthly consideration” he is “productively employing his capital asset (the farm)” in a way “not materially distinguishable from a lessor under a mineral lease and one must have regard not so much to the form as to the real character of the transaction”;

(v) “was no merit in the distinguishing features claimed by appellant between the facts in this case and those present in *Samril Investments (Pty) Ltd v C: SARS 65 SATC 1* which would render the true nature of the transactions the disposal of a capital asset and not the production of revenue”

(vi) “accordingly, the Special Court was correct in finding that appellant had not shown that the decision of the Commissioner for SARS to treat the receipts from the sales as revenue in its hands was wrong”.

It appears that the Judges placed significant emphasis on the prevalence of the payments. He referred to the payments as being “periodic payments” and “monthly consideration” also indicating that they may be compensation in the form of “rent or royalties”. It is evident that the frequency of the payments played an important part in the classification process and that the rate of recurrence stood opposed to the capital contention by the taxpayer.

The recurring nature of the receipts is a strong indication of the trading nature of the recipient. Williams refers to it as follows: “In an inquiry as to the existence of a trade,

the number of similar transactions by the taxpayer is relevant, as is the scale of the activities.”<sup>18</sup>

In concluding his verdict on the nature of the income, Judge Davis found no merit in the claims by the appellant, to materially distinguish the facts found in the present case from the facts present in the *Samril*<sup>19</sup> case. Which facts would support the claim that the nature of the transactions was a capital disposal as opposed to in the production of income.

The significance of the result of the above was that the taxpayer failed to convince the Supreme Court that the transactions were on capital account, as well as failed to distinguish the facts of the current case from a previous case heard by the same court which also found against the taxpayer.

Although the issue of trading stock falls outside the scope of the primary discussion, it formed part of the submissions by the taxpayer and warrants a brief overview.

The argument presented by the taxpayer in the alternative, was that in the circumstance that the court judged the receipts to be revenue, the appellant would be allowed as a deduction, the opening stock held at the beginning of each year, in respect of trading stock.

It would appear that the argument for an opening stock deduction stood on firm footing if one refers back to the judgement in the *Van Blerk* case on p137 where Judge Davis made the following statement; “In my view the record of the sales of sand, albeit to a single purchaser, had all the characteristics of trading in this commodity. Respondent employed his sand as his stock in trade. Trading stock is defined in s 1 of the Act to include:

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<sup>18</sup> Williams, RC. (2005). *Income Tax in South Africa – Cases and Materials*. 2<sup>nd</sup> ed. Durban: LexisNexis Butterworths

<sup>19</sup> *Samril Investments (Pty) Ltd v Commissioner for South African Revenue Service*. 2003 SA 658

‘anything produced, manufactured, purchased or in any other manner acquired by a taxpayer for purposes of manufacture, sale, exchange by him or on his behalf or the proceeds from the disposal of which forms or will form part of his gross income . . .’

In the present case sand was sold on a regular basis over a number of years. In itself this is indicative of a taxpayer who was engaged in a trade and employed the sand in the nature of trading stock pursuant to a scheme of profit making.”

When considering this statement by Judge Davis it is unsurprising that the taxpayer sought to postpone his tax liability by introducing the argument for a closing stock on hand allowance. In presenting the case before court, it appears as if counsel for the taxpayer was undecided towards the basis for their argument. From the court papers it is suggested that counsel accepted, in their heads of argument that a claim for closing stock could only arise after the sand was separated from “the remainder of the land comprising the farm”<sup>20</sup>. Counsel reconsidered this view during oral argument and suggested that the whole sand deposit should be considered as closing stock. Added to this uncertainty in their argument, counsel hesitantly regressed from arguing the application of s22<sup>21</sup> of the ITA to “an alleged practice in the Receiver’s office”.<sup>22</sup>

Judgement was concluded with the finding that: “accordingly, no ascertainable part of the sand deposit could fairly be described as trading stock held by appellant.”

Upon hearing the appeal from the tax court, Judge Hefer upheld the decisions of Judge Davis and dismissed the appeal on both counts. The unanimous decision was also supported by the full bench of the Supreme Court on both counts.

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<sup>20</sup> *Ernst Bester Trust v Commissioner for South African Revenue Service*. [2008] 70 SATC 151 (Supreme Court of Appeal of South Africa); p159

<sup>21</sup> Section 22 of the Income Tax Act refers to; “Amounts to be taken into account in respect of values of trading stocks”

<sup>22</sup> Although the argument referred to closing stock, which would increase income, the same closing stock would be a deduction in the next year as opening stock and reduce income in that year. A revenue practice of SARS is to allow an opening stock deduction in the year of sale (if gross income) if there was no purchase deduction or closing stock previously.

## 2.5 Conclusion:

On review of the three cases above, there is a palpable progression in the nature of the arguments put forward by the representatives of the unrelated taxpayers. The foundation and succession of arguments advanced during the hearings are indicative of the close nature pertaining to the associated facts of all these transactions.

During the first case the arguments presented focussed on whether the sand, from which the proceeds were generated, formed part of the fruit or corpus of the farm. The taxpayer was unsuccessful in persuading the judge that the principle as set out in *Glenboig*<sup>23</sup> was applicable to the present case. By the disregard of the contention that the sand was part of the capital structure of the farm, the focus shifted “exclusively” to the nature of the business carried on by the taxpayer.

The view taken by the court in judging that the taxpayer was trading in sand was a key finding in the case. In the closing statements of the ruling, the judge alluded to the significance he specifically placed on the aspect of trading along with the recurring nature of the transactions.

It is interesting to note that in the case of *Samril Investments*, the appellant induced the reasoning of a single transaction affecting the rights to acquire the sand from the farm. The view stands in stark contrast to the notion of actively trading in the commodity. This rather creative adaptation to the conditions found in *Van Blerk* also proved futile, as the court found no reason to believe that the “right to acquire” stood separate from the sand deposit itself. If the defence were able to successfully argue the point of a single transaction, they would have been able to guide and steer the argument away from the repetitive nature of the transactions. Which argument in *Van Blerk*, was “sand was sold on a regular basis over a number of years and in itself this was indicative of a taxpayer who had been engaged in a trade and had employed the sand in the nature of trading stock”

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<sup>23</sup> *Glenboig Union Fire Clay Company Ltd v The Commissioner for Inland Revenue*. [1922] SC (HL) 122, 12 TC 427

Judge Hefer made the statement that “Each case must be decided on its own facts”, which is a common doctrine followed by the courts<sup>24</sup>. Although there are distinctive facts and unique circumstances relating to each undertaking, there is a noticeable thread running between these analogous transactions. When comparing Van Blerk to Samril Investments, the contracts were unique and distinguishable, but the *modus operandi*<sup>25</sup> proved similar.

At the time when Ernst Bester Trust went to court, both the previous cases were available as reference for precedent. Representation for Ernst Bester Trust submitted two arguments, offering an alternative stance in circumstances where the main argument is dismissed. Being fully aware of the outcomes in the previous cases, the first endeavour was an attempt to distinguish the facts of the present case from that found in Samril Investments, and to a certain extent in that of Van Blerk. Six points of distinction were raised by the defence in Ernst Bester in an attempt to extenuate their case from the findings in Samril Investments and to mitigate the chances of the judge reaching a similar conclusion.

Ernst Bester Trust came up short in convincing the court that their intent to trade on capital account was enough evidence to reach a different outcome. The introduction of their alternative submission was futile, as the taxpayer was again unsuccessful in persuading the court to find in its favour. The court was never convinced of the “opening stock” façade and disallowed the taxpayer the opportunity to defer their tax liability with an opening stock deduction from income.

The judgements reached in each of the three cases, creates the impression and general understanding that transactions of a similar nature would most probably result in comparable outcome, *ceteris paribus*<sup>26</sup>. The tax field is a dynamic area, with

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<sup>24</sup> Daniels, Nicola. (2012). Common legal terms, real business meanings: reasonable, all reasonable or best endeavours? Eversheds, [online] Available at: <http://www.lexology.com/library/detail.aspx?g=ad5bada5-81c1-4a5f-8de9-21161af5365e> (Accessed 17 October 2016)

<sup>25</sup> *Modus operandi*. In: Merriam-Webster [online] Springfield: Merriam-Webster, Inc. Available at: <http://www.merriam-webster.com/dictionary/modus%20operandi> [Accessed 17 October 2016]

<sup>26</sup> *Ceteris paribus* or *caeteris paribus* is a Latin phrase meaning "other things equal". English translations of the phrase include "all other things being equal" or "other things held constant" or "all else unchanged". [https://en.wikipedia.org/wiki/Ceteris\\_paribus](https://en.wikipedia.org/wiki/Ceteris_paribus); Accessed [19 June 2017]



legislative changes and introduction of new laws a constant occurrence. It is in these changes and introductions that we find some ground to challenge the status quo of these cases.

The next two chapters focus on the additions and amendments to legislation which may impact and influence the judgement of future transactions in contradistinction to the decision and principles laid down in the 3 cases discussed in this chapter.

## CHAPTER 3: CHANGES IN TAX LEGISLATION

### 3.1 Introduction:

This chapter will provide an overview of the introduction of Capital Gains Tax (CGT) into South African tax legislation in 2001. During the course of this chapter, a brief discussion regarding the effects of CGT will be provided along with the impact it might exert on the topic of this dissertation. These considerations along with a discussion on the mechanics of CGT will form the framework of the chapter.

It is agreed from the onset of this chapter that the introduction of CGT does not have any material effect on the classification of income with regards to its capital or revenue nature, but it does have a bona fide effect on the monetary and tax outcome of a capital receipt, once so classified. The result is that CGT is not an influential factor to be considered when dealing with the issue of classification of income, but rather the mechanism for taxing the income after it has previously been categorised.

The last section of the chapter will visit in short, the application of the term 'deemed disposal'. With the introduction of the Mineral and Petroleum Resources Development Act, 20 of 2002 (the MPRDA), the issue of quasi expropriation of mineral rights in South Africa was raised. In delivering his ruling in *Agri SA vs the Minister for Minerals and Energy*<sup>27</sup>, the judge of the Constitutional Court obiter set aside the notion of expropriation being caused by the MPRDA. A discussion on expropriation will be continued in chapter 5. A synopsis of the deemed disposal effect is however considered appropriate and addressed in this chapter.

### 3.2 The Introduction of Capital Gains Tax (CGT):

The South African historical tax landscape did not include any income tax consequence on the income generated as a result of transactions involving the disposal of capital

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<sup>27</sup> *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; Constitutional Court of South Africa; p3

items. This meant that the increase or decrease in value realised by a taxpayer, when an item was traded on capital account, was a gain or loss recognised without further income tax implications.

Capital Gains Tax (CGT) was first introduced in South Africa by the then minister of Finance, Trevor Manuel, during his budget speech on 23 February 2000. This addition to the fiscal policy brought South Africa in line with international tax practice of leading first world countries such as USA, Canada, the UK and Australia.<sup>28</sup> The result was a widening of the tax net in South Africa, which for the first time allowed the fiscus to benefit from transactions performed on capital account. The fiscus profited from this change in legislation by including in the taxable income of taxpayers, certain capital gains realised (and unrealised) by them.

The legislative introduction into the Income Tax Act no. 58 of 1962 ("the ITA") was made under a new section 26A which must be read together with the Eighth Schedule to the same Act. CGT took effect from October 2001 onwards, with changes to the legislation being issued on a regular basis. The core principles managing the functionality of CGT remain rather intact since inauguration of the concept.

CGT is given effect when a net capital gain realised for the current year of assessment is multiplied by the inclusion rate applicable to the taxpayer to arrive at the taxable portion of the capital gain. This taxable portion of the capital gain is then added to other taxable earnings to result in the total taxable earnings for the taxpayer.<sup>29</sup>

The inclusion rate referred to in the previous paragraph, is calculated according to the class of taxpayer. The applicable rates for the 2018 year of assessment are:

- 40% for Natural persons (including Insolvent and Deceased Estates)

<sup>28</sup> Brooklyn Properties. CGT. [online] Available at: [http://www.brooklynproperties.co.za/index.php?option=com\\_content&view=article&id=26&Itemid=436/](http://www.brooklynproperties.co.za/index.php?option=com_content&view=article&id=26&Itemid=436/); Accessed [16 February 2017]

<sup>29</sup> Capital Gains Tax, The South African Revenue Service. [online] Available at: <http://www.sars.gov.za/TaxTypes/CGT/Proceeds/Calc-Tax-Capital/Pages/Inclusion-rate.aspx> ; Accessed [19 June 2017]

- 40% for Special Trusts (see definition for special trust<sup>30</sup>)
- 80% for Companies, Closed Corporations, Trusts, etc (see extended list<sup>31</sup>)

These inclusion rates have steadily increased to these rates since they took effect in 2001, when they were as follows:

- 25% for Natural persons (including Insolvent and Deceased Estates)
- 25% for special trusts
- 50% for Companies, Closed Corporations, Trusts, etc<sup>32</sup>

### 3.3 The effect of CGT on receipts:

Before the introduction of CGT in 2000, capital income enjoyed a 100% exemption from taxable income. The definition of taxable income did not include a provision for capital gain and section 26A, "Inclusion of taxable capital in taxable income", was inserted into the ITA in 2001. Since the insertion of CGT into tax legislation, inclusion rates for capital gains have increased from their initial relatively low percentages to become more comprehensive in their effect. The inclusion rates have seen a firm increase over the years in which it has been in force. The effect of the increased taxability of capital gains has arguably led to greater awareness of the tax consequences on capital transactions.

Currently, the tax beneficial treatment of a capital gain, attained through the limited inclusion rates into taxable income, is in some cases limited to a mere 20% of the value of the receipt (100% of revenue receipt minus inclusion rate for companies at 80% of capital receipt). The benefit, in having a receipt classified as capital instead of

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<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Personal finance; Tax; [online] Available at: <http://www.iol.co.za/personal-finance/tax/your-guide-to-cgt---part-1-990547> ; Accessed [19 June 2017]; and The Income Tax Act No 58 of 1962, 2004 edition, para 24D read with 'The Eighth Schedule' of the same Act.

revenue in nature, has diminished to a trivial percentage instead of the total receipt as seen in previous years. The continued trend of increased inclusion rates, fuels the question whether the capital versus revenue disputes are still worth the effort, considering the unassuming benefit left by distinguishing between the two, and in particular under certain conditions.

Disputes over the capital or revenue nature of income were frequent and plentiful before 2000, when taxpayers and SARS argued their diverse views regarding the classification of income. Previously, it was an all-or-nothing tax dispute (revenue = all; capital=nothing) when a taxpayer disposed of a capital asset and earlier case reports are littered with the capital vs revenue debate. Since the introduction of CGT, there has been a radical decline in reported cases on the topic. The probable cause to the decline being the recovery of a portion of tax on the transaction by the revenue authority in any event, whether capital or revenue.<sup>33</sup>

The distinction between capital and revenue remains relevant, for at least 20% of a capital gain remains outside the tax net. In some cases as much as 60% (in the case of natural persons) avoid inclusion in taxable income, when a capital gain is realised.

### 3.4 Disposal of a capital asset:

Although the ITA makes provision for capital gains and losses to be taken into account during the assessment of a taxpayer's tax liability, it is the capital gain that is of interest here. In paragraph 3 of Part II of the Eighth Schedule to the ITA, a *capital gain* is defined as:

"A person's capital gain for the a year of assessment, in respect of the disposal of an asset –

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<sup>33</sup> Capital v Revenue: The debate is not closed; PwC South Africa; [online] Available at: <http://www.thesait.org.za/news/283511/Capital-v-revenue--the-debate-is-not-closed-.htm>; Accessed [19 June 2017]

(a) during that year, is equal to the amount by which the proceeds received or accrued in respect of that disposal exceed the base cost of that asset;”

The definition of capital gain reveals that the disposal of an asset gives rise to the incurrance of a possible capital gain scenario. It is imperative to recognize the extent of the meaning of ‘disposal’. Disposal does not only refer to a mere sale of an asset; it is more convoluted than that. A disposal can occur when an asset is sold, given away, scrapped, exchanged, destroyed or redeemed or cancelled<sup>34</sup>.

In Chapter 3.1 the notion of disposal of an asset was introduced without any further validation of the concept. *Disposal* is defined in the Eighth Schedule of the ITA as:

“means an event, act, forbearance or operation of law envisaged in paragraph 11 or an event, act, forbearance or operation of law which is in terms of this Schedule treated as the disposal of an asset, and “dispose” must be construed accordingly;”

It becomes evident, after examining the definition of disposal, that disposal is more than a mere sale or realisation of an asset. A broader approach would be to say that ‘CGT may be triggered upon a CGT event’<sup>35</sup>. This includes a sale and realisation, but goes much further in scope to include an array of similar incidence. The definition also includes a reference to ‘paragraph 11’ of the same act, this paragraph contains a list of situations regarded as a disposal. Paragraph 11 includes any event which results in the creation, variation, transfer or extinction of an asset, as a means of disposal.<sup>36</sup>

The previous paragraph and discussion illustrate that not only the apparent meaning of disposal is viewed as a disposal for CGT purposes. The scope for inclusion into the definition is further widened when the deeming provisions are considered. The deeming provisions of the ITA<sup>37</sup> treat the occurrence of certain events as if a disposal was effected, for CGT purposes. Of these deemed disposal events, the provisions

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<sup>34</sup> Budget Proposals, 801 Capital Gains Tax; SAICA; p3; [online] Available at: [http://www.saica.co.za/integritax/2000/801\\_Capital\\_gains\\_tax\\_1.htm](http://www.saica.co.za/integritax/2000/801_Capital_gains_tax_1.htm) ; Accessed: [11 September 2017]

<sup>35</sup> Guide to Capital Gains Tax; South African Revenue Service; p10; [online] Available at: <http://www.treasury.gov.za/documents/national%20budget/2000/cgt/cgt.pdf> ; Accessed [11 September 2017]

<sup>36</sup> The Income Tax Act No. 58 of 1962; The Eighth Schedule; Para 11

<sup>37</sup> The Income Tax Act No. 58 of 1962; The Eighth Schedule; Para 12

contained in para 12(2)(c)<sup>38</sup> relate closely to the findings in the court cases discussed in chapter 2. Para12 (2) (c) addresses the issue when an asset previously held as capital, commences to be held as part of trading stock: “assets that are held by a person otherwise than as trading stock, when they commence to be held by that person as trading stock”.

In Van Blerk<sup>39</sup> the judge ruled that a previously held part of the corpus/capital of the land, was converted to trading stock by the operations of the taxpayer: “That the transactions in issue represented the proceeds of sales in which respondent had sought to employ a commodity which admittedly formed part of the corpus of his land for profit and in this he was successful and the repeated sales of sand in the manner undertaken by respondent had all the characteristics of ordinary trading in the commodity.”

The case involving Samril<sup>40</sup> is also one where the sand was never purchased as trading stock, but as part of the land and the treatment upon its disposal formed the main focus of the discussion. It is again interesting to note that in this case, there appears to be an exact moment when the sand held as part of the capital structure, transforms and becomes a tradeable commodity: “income was generated by exploiting the resources on what was admittedly a capital asset and was plainly designedly sought and worked for, affords at least *prima facie* evidence that it was in the nature of revenue and not capital.”

In the third case concerning Ernst Bester<sup>41</sup>, the judge reached a similar outcome to the verdict in Samril. The judge concluded that: there “was no merit in the distinguishing features claimed by appellant between the facts in this case and those present in Samril Investments (Pty) Ltd v C: SARS 65 SATC 1 which would render the true nature of the transactions the disposal of a capital asset and not the production of revenue”

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<sup>38</sup> Ibid

<sup>39</sup> *Commissioner for South African Revenue Service v Van Blerk* [2000] 62 SATC 131 (Cape of Good Hope Provincial Division of the Supreme Court of South Africa)

<sup>40</sup> *Samril Investments (Pty) Ltd v Commissioner for South African Revenue Service*. 2003 SA 658

<sup>41</sup> *Ernst Bester Trust v Commissioner for South African Revenue Service*. [2008] 70 SATC 151 (Supreme Court of Appeal of South Africa)

From the extracts on the three cases, a causal connection can be drawn to the reference of trade and trading in a commodity, which previously formed part of the capital structure of the taxpayer. It is this conversion of the capital item to trading stock that unlocks the possibility of para 12(2)(c)<sup>42</sup> coming into effect in the sand cases.

### 3.5 Conclusion:

The introduction of CGT does not have any material effect on the classification of income as capital or revenue, but it does have a real effect on the after tax portion of the receipt. CGT is effectively a tax on wealthy individuals who possess capital assets that increase in value over time. Although it is not officially regarded as a wealth tax<sup>43</sup>, it is these taxpayers who encounter the risks associated with CGT and it therefore remains an integral part of any proper tax strategy and plan in respect of a transaction.

Awareness and consideration is required when a transaction involving an asset of high value is involved, as it runs the risk of attracting a CGT liability or full taxation as revenue. The consequences of such a scenario may be avoidable to an extent, due to the disparity of inclusions rates for capital gains, afforded the classes of taxpayer. Improper planning may leave the taxpayer with an unnecessary tax burden which could have been negated or avoided by proper tax diligence and proactive groundwork.

Although CGT was not in force at the time of hearing the cases in Chapter 2, and furthermore would not have had any material effect on their outcome due to their revenue nature, the tax effects would appear to be different today even if the decision was the same. The commodity in these cases, the sand deposit found on the farms, was conceded to be part of the corpus of the land – “a commodity which admittedly

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<sup>42</sup> The Income Tax Act No. 58 of 1962; The Eighth Schedule; Para 12

<sup>43</sup> Capital Gains Tax: Briefing; Parliamentary Monitoring Group; NCOP Finance; [online] Available at: <https://pmg.org.za/committee-meeting/211/>; Accessed [19 June 2017]



formed part of the corpus of his land”<sup>44</sup>. It is the manner in which the owners dealt with this corpus that in the view of the courts, gave way to a change in the nature of these items. The judge said in *Van Blerk*<sup>45</sup>: “the proceeds of the sale are not to be determined by whether fruits or corpus had been sold but rather by means of an examination of the nature of the transactions and the intention with which they were undertaken by the taxpayer”.

The result of the findings would be that the taxpayers would, after the introduction of CGT, first have to navigate the CGT implications of the sand deposit becoming trading stock before they could deal with the revenue nature of the income generated from the sale thereof. This provides a very distinct challenge from the ones we find in the cases in chapter 2.

The effect of the CGT implications of the cases in chapter 2 falls outside the parameters of this study. However it is worth noting that on a deemed disposal (capital asset becomes trading stock) the market value used for the asset to determine proceeds for CGT becomes the opening stock value to be taken into account (and set off) against the subsequent revenue sale of sand.

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<sup>44</sup> *Commissioner for South African Revenue Service v Van Blerk* [2000] 62 SATC 131 (Cape of Good Hope Provincial Division of the Supreme Court of South Africa)

<sup>45</sup> *Commissioner for South African Revenue Service v Van Blerk* [2000] 62 SATC 131 (Cape of Good Hope Provincial Division of the Supreme Court of South Africa)

## CHAPTER 4: INTRODUCTION OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT

### 4.1 Introduction:

This chapter provides a brief overview of the history of the ownership of mineral rights in South Africa, up until the introduction of the Mineral and Petroleum Resources Development Act, 20 of 2002. This is to serve as a basis and background for the discussion in the next chapter on whether the precedents and principles set by previous case law are still appropriate or whether an alternative outcome is possible in light of the changes.

The Mineral and Petroleum Resources Development Act, 20 of 2002 (MPRDA) was first promulgated on 01 May 2004<sup>46</sup>. The MPRDA replaced the Mineral Act, 50 of 1991, which regulated all legislation relating to the mining industry since its inception in 1991<sup>47</sup>.

The MPRDA has introduced a new era for the mining industry with emphasis on the State's role as custodian, with the preamble to the act reading: "ACKNOWLEDGING that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof;"<sup>48</sup>.

The MPRDA has introduced a dual system of mineral rights, where some of these rights are owned by the State and others by private owners.<sup>49</sup> The previous piece of legislation governing minerals along with the common law, provided that when ownership is obtained of a piece of land, included in the ownership were the minerals

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<sup>46</sup> Lawyer.co.za; FAQ: Mineral Law; [online] Available at: <http://www.lawyer.co.za/index.php/mineral-law#no1> ; Accessed [14 June 2016]

<sup>47</sup> Ibid

<sup>48</sup> Mineral and Petroleum Resources Development Act 28 OF 2002

<sup>49</sup> Lawyer.co.za; FAQ: Mineral Law; [online] Available at: <http://www.lawyer.co.za/index.php/mineral-law#no1> ; Accessed [14 June 2016]

embedded below the surface of the land. The current position of the law is such that mineral rights can be separated from the land.<sup>50</sup>

## 4.2 The history of mining law in South Africa:

The history of mining law in South Africa dates back to the time when the Cape was colonised by the Dutch around 1652, when the Roman-Dutch legal system became the law of the land.<sup>51</sup> It is believed that Dutch law did not have a major influence on mining law per se, as mining did not play a significant role in Holland at the time. Notwithstanding, the maxim of "*cuius est solum eius est usque ad coelum et ad inferos*" as contained in property law, from Roman Common Law, was part of this inheritance.<sup>52</sup> This maxim is shortened to the doctrine of "*ad coelum*"<sup>53</sup> and is Latin for "whoever's is the soil, it is theirs all the way to Heaven and all the way to hell"<sup>54</sup>. The principle from Property Law means; property holders have rights not only to the plot of land itself, but also to the air above and the ground below<sup>55</sup>.

This era was followed by a period of British rule and the introduction of English law. During this tenure, under British control, the Roman-Dutch system was retained as the common law.<sup>56</sup> It was also during this period that the first signs of a move from private towards State ownership of mineral rights are first noticed. The Cradock Proclamation of 1813 steered away from the principles contained in the Roman-Dutch law by reserving the 'right to mine' precious stones, gold and silver for the Government of

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<sup>50</sup> Ibid

<sup>51</sup> The Journal of The South African Institute of Mining and Metallurgy; p370 [online] Available at: <https://www.saimm.co.za/Journal/v098n07p369.pdf>; Accessed [20 June 2017]

<sup>52</sup> Cawood, FT and Minnitt, RCA. (1998) Journal of The South African Institute of Mining and Metallurgy. A historical perspective on the economics of the ownership of mineral rights ownership. [online] Available at: <https://www.saimm.co.za/Journal/v098n07p369.pdf>; Accessed [20 June 2017]

<sup>53</sup> Wikipedia; 2016. *Cuius est solum, eius est usque ad coelum et ad inferos*; [online] Available at: [https://en.wikipedia.org/wiki/Cuius\\_est\\_solum\\_eius\\_est\\_usque\\_ad\\_coelum\\_et\\_ad\\_inferos](https://en.wikipedia.org/wiki/Cuius_est_solum_eius_est_usque_ad_coelum_et_ad_inferos); Accessed [20 June 2017]

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Cawood, FT and Minnitt, RCA. (1998) Journal of The South African Institute of Mining and Metallurgy. A historical perspective on the economics of the ownership of mineral rights ownership. [online] Available at: <https://www.saimm.co.za/Journal/v098n07p369.pdf>; Accessed [20 June 2017]

the Cape Colony. This was a trait inherited from the customs contained in English Law.<sup>57</sup>

This term of State involvement was succeeded by the creation of independent provincial states along with the formation of independent provincial governments within the boundaries of the country. These newly formed self regulating organs of state, passed statutes which reserved the minerals to the sole access of these States.<sup>58</sup>

The intricacy of the mineral law at the time is best illustrated by a direct citation from The Mining Laws of the British Empire<sup>59</sup>:

“There is a further difficulty induced by the fact that on the one hand until the Union was effected there were several Supreme Courts all administering the Roman-Dutch law in South Africa and as a consequence there was a tendency [for] the different South African colonies to drift apart by reason of contradictory decisions, while on the other hand each of the various parts of the Union has a special and elaborate code of statute law relating to mining which codes are by no means the same in detail and differ on occasion in principle.”

In 1910 the Union of South Africa was formed and an attempt was made to consolidate the various Provincial Statutes that existed.<sup>60</sup> The Union of South Africa proceeded to 1961, when it became known as the Republic of South Africa. Up to the year 1961, mineral rights legislation in South Africa developed in such a way that separate minerals were regulated by individual statutes which added to the complexity of the system.<sup>61</sup> The years 1964 – 1967 saw an attempt to consolidate post-Union legislation into four major Acts.<sup>62</sup> The Mining Rights Act 20 of 1967 was

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<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> Stone, G. The mining laws of the British Empire and Foreign Countries, Vol. 3 (London, HM Stationery Office, 1922), p. 1. Citing from: Van der Schyff, E. (2012). South African mineral Law: A historical overview of the State's regulatory power regarding the exploitation of minerals. Faculty of Law, NWU, Potchefstroom Campus.

<sup>60</sup> Cawood, FT and Minnitt, RCA. (1998) Journal of The South African Institute of Mining and Metallurgy. A historical perspective on the economics of the ownership of mineral rights ownership. [online] Available at: <https://www.saimm.co.za/Journal/v098n07p369.pdf> ; Accessed [20 June 2017]

<sup>61</sup> Ibid

<sup>62</sup> Van der Schyff, E. (2012). (Dissertation), South African mineral Law: A historical overview of the State's regulatory power regarding the exploitation of minerals. Faculty of Law, NWU, Potchefstroom Campus. p148

one of these acts and was an attempt to consolidate the plethora of mineral legislation under a single Act.

The Mining Rights Act 20 of 1967 was repealed in 1992 by the Minerals Act 50 of 1991 (Minerals Act) with only limited features remaining intact. The Minerals Act took a significant step towards private ownership of mineral rights, as it provided for the transfer of the right to prospect for and to mine those minerals that had previously been reserved exclusively for the State, to the mineral rights owner<sup>63</sup>.

A noteworthy feature contained in the Minerals Act 50 of 1991, with reference to the ownership of mineral rights, is the provision which allows for the outright disposal of State owned mineral rights to the private sector, under section 64 of the said Act. The inference to be made from this inclusion is; that it was the aim of the then government to reduce its involvement in the mining industry and to create a market for the previously, State-owned mineral rights. This provision in the Minerals Act 50 of 1991 stood seemingly opposed, to the declared political philosophy of the then political opposition, who was amicably in favour of State ownership in respect of all mineral rights.<sup>64</sup>

The cases in chapter 2; *Ernst Bester*, *Samril* and *van Blerk* respectively, were adjudicated whilst the Minerals Act 50 of 1991 was in force. The Minerals Act 50 of 1991 did not have a prolonged tenure, as it was replaced by the MPRDA in 2002, in just more than a decade after the Minerals Act 50 of 1991 was first adopted.

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<sup>63</sup> Cawood, FT and Minnitt, RCA. (1998) Journal of The South African Institute of Mining and Metallurgy. A historical perspective on the economics of the ownership of mineral rights ownership. [online] Available at: <https://www.saimm.co.za/Journal/v098n07p369.pdf> ; Accessed [20 June 2017]

<sup>64</sup> Cawood, FT and Minnitt, RCA. (1998) Journal of The South African Institute of Mining and Metallurgy. A historical perspective on the economics of the ownership of mineral rights ownership. [online] Available at: <https://www.saimm.co.za/Journal/v098n07p369.pdf> ; Accessed [20 June 2017]

### 4.3 The Promulgation of the Mineral and Petroleum Resources Development Act (MPRDA):

The Mineral and Petroleum Resources Development Act, 20 of 2002 (MPRDA) came into force on the 1<sup>st</sup> of May 2004 and with it ushered in a new regime for the exploitation and utilisation of mineral and petroleum resources captured within the confines of the Republic of South Africa.<sup>65</sup>

The MPRDA acknowledges that the country's untapped mineral and petroleum resources belong to the nation and that the State is duly appointed as the custodian of these resources.<sup>66</sup> The preamble to the MPRDA states: "ACKNOWLEDGING that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof". This statement is regarded as a move away from the common law position discussed earlier, where the land owner is the owner of the whole of the land, including the air space above the surface and everything below it.<sup>67</sup> Under previous legislation, the common law position would have included the minerals within the land, as part of the land and directly accessible to the landowner. The move to the MPRDA has changed this status quo and the access to minerals can now be separated from the landowners.<sup>68</sup>

The State has in essence fortified their grip on the mining resources in South Africa, from their position as custodian to these untapped commodities, the State has the ultimate responsibility to grant, issue, control, administer and manage all rights in minerals within their borders.<sup>69</sup>

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<sup>65</sup> Tucker, C and Muleza, T. (2016). Bowman Gilfillan. New order mining rights four years into a new mining regime. [online] Available at: <http://www.bowman.co.za/News-Blog/Blog/New-order-mining-rights-four-years-into-new-mining-regime-by-Claire-Tucker-and-Twaambo-Muleza> ; Accessed [14 June 2016]

<sup>66</sup> Van der Schyff, E. (2012). (Dissertation), South African mineral Law: A historical overview of the State's regulatory power regarding the exploitation of minerals. Faculty of Law, NWU, Potchefstroom Campus. p132

<sup>67</sup> Tucker, C and Muleza, T. (2016). Bowman Gilfillan. New order mining rights four years into a new mining regime. [online] Available at: <http://www.bowman.co.za/News-Blog/Blog/New-order-mining-rights-four-years-into-new-mining-regime-by-Claire-Tucker-and-Twaambo-Muleza> ; Accessed [14 June 2016]

<sup>68</sup> Lawyer.co.za; FAQ: Mineral Law; [online] Available at: <http://www.lawyer.co.za/index.php/mineral-law#no1> ; Accessed [14 June 2016]

<sup>69</sup> Van der Schyff, E. (2012). (Dissertation), South African mineral Law: A historical overview of the State's regulatory power regarding the exploitation of minerals. Faculty of Law, NWU, Potchefstroom Campus. p131

#### 4.4 What impact did the MPRDA have on landowner's mineral rights:

Previously, the common law recognised the rights of landowners in relation to mining activities on their property.<sup>70</sup> Under the Minerals Act, 50 of 1991, the landowners were the holders of the mineral rights, unless the rights were severed from the land ownership. This meant that landowners had the prerogative to decide if and by whom, prospecting and mining activities, could take place on their land.<sup>71</sup>

The MPRDA diverts completely from this position held by the Minerals Act, 50 of 1991, where the underlying policy was to advance and promote mining activity by limiting the involvement of the state and in particular the rights to access these minerals. The regulatory power which the State had under the immediate preceding act, did not allow for interference with the landowner's privilege to decide whether and by whom mining activities may be conducted.<sup>72</sup> The divergence caused by the MPRDA is best observed in this regard, as the Act now grants the State this privilege at its sole discretion. The State now possesses the solitary authority along with the responsibility, to manage the nation's mineral resource exploitation.<sup>73</sup>

The effect of the MPRDA is that, although it does not expressly award the State the ownership of the unmined minerals, it neutralises the landowner's absolute right over minerals found on or under the surface of the property owned. Whilst the landowner retains ultimate ownership over the land, the ability to access the mineral resources has been encumbered.<sup>74</sup>

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<sup>70</sup> Minerals Act 50, 1991, Section 5(1)

<sup>71</sup> Van der Schyff, E. (2012). (Dissertation), South African mineral Law: A historical overview of the State's regulatory power regarding the exploitation of minerals. Faculty of Law, NWU, Potchefstroom Campus. p132

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> Tucker, C and Muleza, T. (2016). Bowman Gilfillan. New order mining rights four years into a new mining regime. [online] Available at: <http://www.bowman.co.za/News-Blog/Blog/New-order-mining-rights-four-years-into-new-mining-regime-by-Claire-Tucker-and-Twaambo-Muleza> ; Accessed [14 June 2016]

## 4.5 Conclusion:

The new legislation created a “use it or lose it” principle, which had been absent from the mineral dispensation previously known<sup>75</sup>. This principle is given leverage by the terms included in the MPRDA whereby third parties may be granted the opportunity to obtain mineral rights over another’s property.<sup>76</sup> This is due to the State being the custodian of all mineral rights in South Africa and allowing the Minister of Mineral Resources the sole discretion to grant, refuse, suspend or cancel any mineral right.<sup>77</sup>

This shift in State powers and involvement regarding minerals, has brought with it the opportunity to revisit the position in which landowner’s stand regarding mineral transactions on their land. The relevance of previous case law will be tested on transactions performed after the changes brought about in the MPRDA and whether the principles subsequently laid down remain applicable. This will be discussed in the next chapter.

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<sup>75</sup> Ibid

<sup>76</sup> Lawyer.co.za; FAQ: Mineral Law; [online] Available at: <http://www.lawyer.co.za/index.php/mineral-law#no1> ; Accessed [14 June 2016]

<sup>77</sup> Ibid



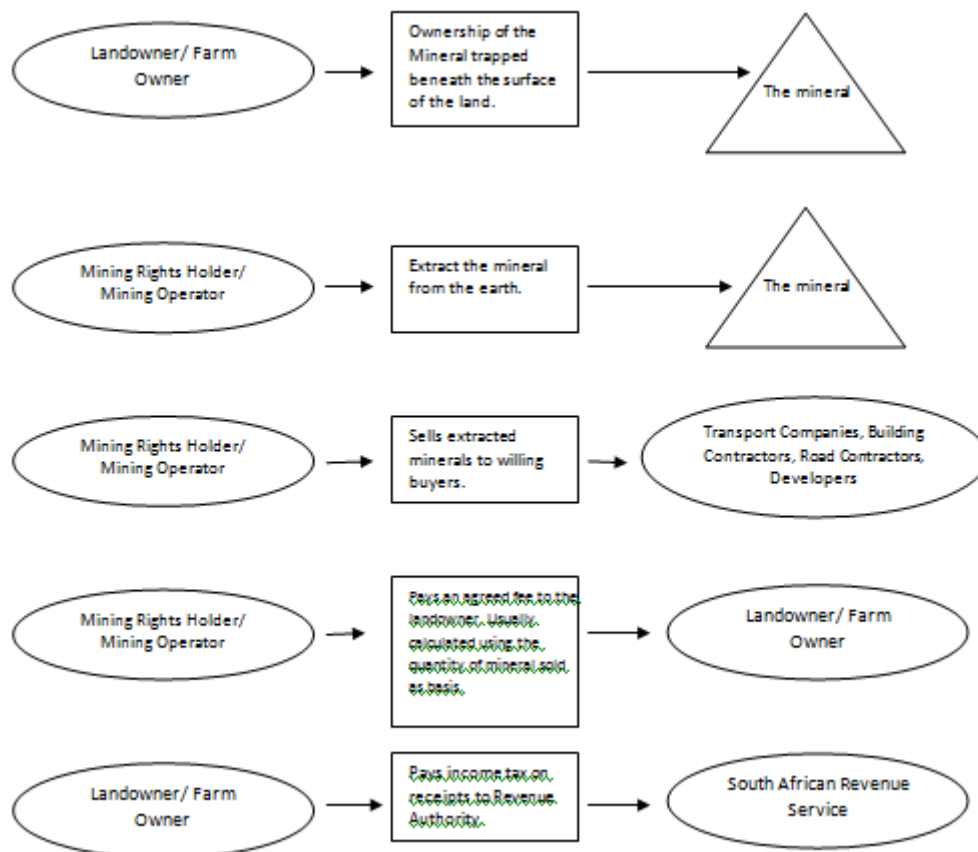
## **CHAPTER 5: THE BASIS FOR TAXING RECEIPTS FROM MINING OPERATORS IN THE HANDS OF LANDOWNERS, POST 2002**

### **5.1 Introduction:**

The status quo for taxing receipts from mining operators in the hands of landowners was established when numerous sand cases were brought to court, amongst others the three cases discussed in chapter 2. All of these cases were heard prior to the introduction of the MPRDA in 2002, subsequently, the relevance of the principles laid down by the courts in these cases remain to be tested within the environment created by the MPRDA. As far as this study paper is concerned, the manner in which landowners and mining operators nowadays structure their dealings, are similar to the arrangements we find in the chapter 2 cases. Consequently, we reassess the situation where, money flows from the mining operator to the landowner on a regular or an ongoing basis, in similar vain to the arrangement prior to 2002, but with the knowledge and understanding of a post MPRDA era dictating the outcome. Recommendations on alternative structuring of these transactions are a real possibility and a discussion on the premise will follow in the next chapter. The focus of the alternative arrangements will look to limit or eliminate the classification of income risk, associated with the existing contractual relationship between landowner and mining operator.

### **5.2 Illustration of cash flows or payments between mining operator and landowner:**

The position held by the role-players under the Minerals Act 50 of 1991 are somewhat different to their positions under the new MPRDA. The contrast in their position is mainly due to the altered position of the landowner under the MPRDA. Before 2002, the positions were as follows: *(author's diagram)*



The diagram above, inserted as an illustration of the relationship between the role-players, encapsulates the position of the landowner as proprietor over the minerals trapped under the surface of the land. This was the position under the preceding act, which assigned the landowner main access to the mineral. This position changed with the introduction of the MPRDA, which awarded the custodianship over all minerals to the state.

The alteration to the historical position is distinctly illustrated by the following extract:

“The principles enshrined in the MA were thrown overboard by the MPRDA. Mineral rights as regulated by the MA were discarded. The ownership of minerals that vested in the landowner was abolished. Section 3(1) of the MPRDA now proclaims: “Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof.” The “old order” rights remained in force for a specified period of time (one to five years) and the holder of those rights must within

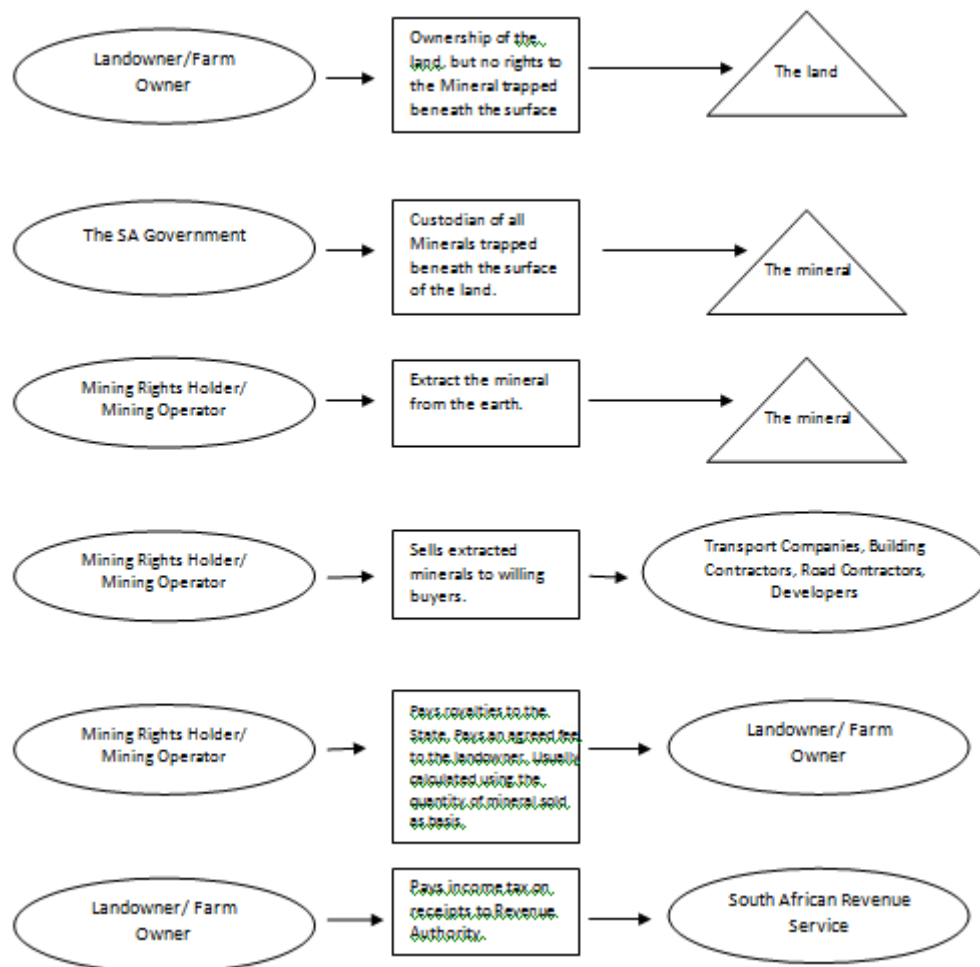
that period apply for prospecting and mining rights. Prospecting and mining rights are no longer registered in the Deeds Office but in the Registration Office for Mineral and Petroleum Titles in Pretoria. Rights in respect of minerals can only be transferred with the written consent of the Minister of Mineral and Energy Affairs. The key question to be considered in this survey is whether or not the changes brought about by the MPRDA amounted to expropriation of the “old order” rights of a landowner and/or of the holder of mineral rights. The High Court, North Gauteng decided that it did amount to expropriation. However, the Supreme Court of Appeal begged to differ. The matter is currently pending before the Constitutional Court of South Africa.”<sup>78</sup>

The quoted phrase above is distinct in the view that, the position of the landowner in relation to the mineral was drastically altered when the MPRDA came into effect. The following diagram illustrates the current position and relationship of the role-players involved in a standard transaction: *(author’s diagram)*

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<sup>78</sup> Van der Vyver, Johan D. (2012). The Nationalisation of mineral rights in South Africa, De Jure, p. 128. Available at: <http://www.dejure.up.ac.za/index.php/en/volumes/45-vol-1-2012/69-article-7.html> [Accessed: 06 November 2017]

The Constitutional Court has heard the case and the content of the verdict reached, by the panel of judges, is discussed in Chapter 6.



There are two changes introduced by the MPRDA as presented in the second diagram, which are significant and notable;

- 1) The landowner no longer retains the ownership of the mineral. The State is appointed as the custodian, in the absence of a proprietor to the mineral; and
- 2) The mining right holder is obligated to pay a royalty to the State on any and all minerals, which after being extracted from the land, are sold.

The changes noted above, is indicative of the view that; when mineral and petroleum resources were privately owned, the fee which was payable for the extraction of these resources to the State, were only payable under certain conditions where mining had

been conducted on State-owned land, etc.<sup>79</sup> That position has in the meantime changed to include royalties on all extracted minerals, regardless of who owned the land. This is examined in the next paragraph.

It is asserted that, in the state's attempt to bring South Africa in line with the prevailing international standards, the country's mineral and petroleum resources are recognised under the MPRDA as the common heritage of all the people of the land with the State as custodian thereof for the benefit of all South Africans.<sup>80</sup> This change in legislation made it possible for the State to institute a broader spectrum levy on the extraction of minerals across the board within the country.

Section 3(2)(b) of the MPRDA allows the Minister of Finance to levy State royalties on extracted minerals, in terms of an Act of Parliament. The Minister achieved this by promulgating the Mineral and Petroleum Resources Royalty Act, 2008 as well as the Mineral and Petroleum Resources Royalty (Administration) Act, 2008, both of which are administered by SARS.<sup>81</sup>

Under these acts, the royalty is triggered on the transfer of a mineral extracted from within the Republic. As is the case for all other taxes, duties, levies, fees or money collected by SARS, the royalty collected is paid to the National Revenue Fund.<sup>82</sup> The Mineral and Petroleum Resources Royalty Act No. 28 of 2008, described the basis for the imposition of a royalty payable as, "A person must pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of a mineral resource extracted from within the Republic".

This section of the act, namely Section 2 was substituted by section 131 (1) of The Tax Laws Amendment Act No. 7 of 2010, which was deemed to have come into operation

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<sup>79</sup> The South African Revenue Service, (2016). *Mineral And Petroleum Resources Royalty*. Available at: <http://www.sars.gov.za/TaxTypes/MPRR/Pages/default.aspx> [Accessed: 04 November 2017]

<sup>80</sup> The South African Revenue Service, (2016). *Mineral And Petroleum Resources Royalty*. Available at: <http://www.sars.gov.za/TaxTypes/MPRR/Pages/default.aspx> [Accessed: 06 November 2017]

<sup>81</sup> Ibid

<sup>82</sup> The South African Revenue Service, (2016). *Mineral And Petroleum Resources Royalty*. Available at: <http://www.sars.gov.za/TaxTypes/MPRR/Pages/default.aspx> [Accessed: 06 November 2017]

on 1 March, 2010 and applicable in respect of mineral resources transferred on or after that date. This section introduced minor changes and reads as follow:

“ 131. (1) The Mineral and Petroleum Resources Royalty Act, 2008, is hereby amended by the substitution for section 2 of the following section:

**“Imposition of royalty**

2. A person must pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of a mineral resource extracted from within the Republic.”.

(2) Subsection (1) is deemed to have come into operation on 1 March 2010 and applies in respect of mineral resources transferred on or after that date.”

Although the act makes it fairly obvious that the payment of royalties to the state is obligatory, in common practice however, the state appears very reluctant in enforcing these payments and structures, especially noticeable within the lower value chain minerals field. In the handful of operations examined during the composition of this paper, none had a royalty payment structure with government in place nor was there any indication that the state was planning on implementing or imposing such a plan. The closest they got to deploying the proposed structure (within the mining district of the chapter 2 cases), was the Department of Mineral Resources’ reference to the retained right to levy royalties in the future, under the relevant sections of the Act.

The product of the restructuring of prevailing legislation resulted primarily in the public custodianship rather than the private ownership of the minerals concerned. This alteration, will as a result of the major impact it brought about, remain a key focus area as the chapter continues.

Although these changes have been noticed and the state’s royalty claim acknowledged by the parties, the cash flow (which takes the shape of a royalty payment structure) between mining operator and landowner is still very much part of the agreement between the parties in ongoing exploration of minerals in the area covered by this

study. The mining operator continues to make periodic payments to the landowner, based on the quantity of mineral removed. In the case of sand, the quantity is measured in cubic metre of the mineral sold during the preceding period and the fee payable is calculated using the formula of quantity multiplied by the agreed rate.

The following section will discuss this exchange of money between the parties and the basis for the payments and calculations in greater detail. It is rather evident that in practice, the relationship between landowner and mining operator has not adopted its former customs and traditions since the inception of the MPRDA.

### **5.3 Basis for payment from mining operator to landowner, as envisaged under the MPRDA:**

Up until 2002 and the promulgation of the MPRDA, money that flowed from mining operator to landowner did so, on a basis that fits into one of the moulds created by the cases examined and discussed in chapter 2. An agreement between parties, before 2002, was entered into, whilst the landowner was also the holder and owner of the rights to the mineral, on and under the land. From the illustration earlier in this chapter, that position has been distorted and the landowner no longer retains the ownership and claim over the minerals trapped on or beneath his land. The arrangement of title under the new act (the MPRDA), positions the mineral under the control of the government, as the mineral rights are assigned under the state's custodianship, with little regard to the position of landowner.

The MPRDA makes provision for certain circumstances when payment or payments between mining operator and landowner are recognised within the scope of the Act. These provisions are fairly specific regarding the conditions to be met, before any payment generated under the guidance of the Act, is to be sanctioned by the Act. Section 54 of the MPRDA("Section 54") contains the provisions for "Compensation payable under certain circumstances", more specific are the terms of subsection or clause 3 of section 54: "(3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the

owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavor to reach an agreement for the payment of compensation for such loss or damage.”(sic)

It is evident that the conditions for payments made under this section of the said Act is considered to be within the ambit of the Act when, the “Regional Manager” has directed his “considerations” to the details of the dispute presented before him. When the issues have been considered, the “Regional Manager” neither has the obligation nor the capacity to determine the extent of the compensation payment, he is simply awarded the authority to “request the parties concerned to endeavor to reach an agreement for the payment of compensation for such loss or damage” (sic). This allows the landowner and mining operator some degree of flexibility to negotiate acceptable terms for settlement of the compensation payable arising from the dispute between them. Should the parties be unable to come to an agreement or not be able to negotiate a settlement acceptable to both parties, section 54(4)<sup>83</sup> makes provision for alternative dispute resolution in the form of arbitration, “If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965), or by a competent court.”.

The application of the provisions and guidelines of the MPRDA, under section 54, are limited to compensation payments only. However, the circumstances under which the premise of this section of the Act becomes applicable, as envisaged by the law makers, remains somewhat uncertain, when considering the limited scope of its inclusion. Without proper guidelines and no common law principles established as yet, it is difficult to evaluate or challenge these provisions.

Section 54 relates to and applies to compensation payable but does not quantify nor prescribe the basis for calculating the settlement amount for the pending damages claim. Further, section (3) determines that, only if the Regional Manager “concludes

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<sup>83</sup> Of the MPRDA



that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations” may he impose the sanction of the section. Section 54 does not restrict the application of its terms to a specific form of damage or loss caused by the mining operation, but seems to allow a predictably large scope for interpretation in applying the remedies of this section of the Act. The result of this relatively vague wording is that we are left with a seemingly wide scope for interpretation, but also some uncertainty regarding the application of section 54 of the act.

#### **5.4 Basis for payment from mining operator to landowner, industry composition:**

The provisions for payment between landowner and mining operator under the MPRDA were discussed in the previous paragraph (5.3). The chapter addressed the issue of damages and the payment that may follow such a claim, along with the process to be followed in settlement of the claim. The MPRDA makes no provision for payment in any other situation or circumstance that may arise between operator and landowner.

Paragraph 5.2 dealt with the payments of “royalties” when minerals are removed, but the parties involved are the operator and the state. Considering the provisions of the Act and the environment created within the Act for the establishment of a mining agreement, very little foundation is created to envisage another basis or origin accountable for the money flowing between operator and landowner.

The focus thus turns to what actually manifests itself as the motive for the payment from operator and landowner to be established. When looking at the industry, we find that the practice is not entirely in line with the approach envisaged in the provisions of the MPRDA. The relationship, personal and professional, between landowner and mining operator is different to the affiliation recognised throughout the MPRDA. The MPRDA documents the following parties to be the involved parties, when an application for a prospecting or mining right is lodged:

- The Applicant
- Department of Mineral Resources
- Department of Environmental Affairs
- Mining Titles (Registration Office)<sup>84</sup>

With regards to the landowner, the MPRDA requires a consultation process with the “occupier of the land” and does not oblige the landowner to be acknowledged further during the application process:

**“Application for prospecting right**

16. (1) Any person who wishes to apply to the Minister for a prospecting right must lodge the application—

(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing—

(a) to submit an environmental management plan; and

(b) to notify in writing and consult with the land owner or lawful occupier and any other affected party and submit the result of the consultation within 30 days from the date of the notice.”<sup>85</sup>

It is difficult to read anything more into section 16(4)(b), besides the MPRDA referring to the landowner only because he or she might also be the occupier of the land and hence be the party to acknowledge consultation with the operator as mandatory in section 16<sup>86</sup>. The Act mandates no special appreciation of the landowner’s rights or

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<sup>84</sup> Lawyer.co.za; FAQ: Mineral Law; [online] Available at: <http://www.lawyer.co.za/index.php/mineral-law#no1> ; Accessed [14 June 2016]

<sup>85</sup> Mineral and Petroleum Resources Development Act 28 OF 2002, Section 16

<sup>86</sup> Ibid

interest in the land more than that of the general occupier of the land on which prospecting is to commence.

This seemingly arbitrary relationship between landowner and mining operator created by the provisions of the MPRDA is not entirely aligned with the affiliation we gather for the industry itself. When the industry is viewed, it is quite evident that the relationship between operator and owner is closer and a more personal relationship than the image initially portrayed by the Act. In many cases it is the owners who initiate and stimulate the attention to the mining prospects on their land. Having their lands mined presents an opportunity, if handled correctly, whereby co-sharing in the rewards from the corpus of the land is a very real possibility. This relationship and attempts by the landowner to gain from the mining expedition relates closer to the previous position of the Act than the limited involvement envisaged in the Act in its current form.

In situations where landowners are oblivious to the prospect of establishing a mining operation and it is the mining operators initiating the process, we encounter an association where it is often a case of joint venture between owner and operator that attempts to register a mining permit over the land. No matter how the operation is initiated, the relationship between operator and owner is a seemingly closer connection than the arbitrary situation sketched in the MPRDA.

This closer connection and the possibility of joint gain from the mining endeavour is the real crux of the question relating to the classification of income in the hands of the landowner. The landowner negotiates a position whereby he is compensated, by the mining operator, per volume of the mineral removed from his land. When acceptable terms are reached and the operator and owner agree to these terms, the parties enter into a contractual agreement containing these terms. This contract forms the basis for the payments generated from operator to owner.

This agreement is very similar to the arrangements prior to the MPRDA commencing in 2002, the question which remains unanswered in agreements of this nature is:

What is the nature of the payment made between these parties now that the MPRDA has changed the playing field?

The position of the MPRDA on the ownership of the minerals is apparent from the phrase “Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof.”<sup>87</sup> This insertion into the MPRDA along with the discussion on the position of the landowner in relation to ownership of the mineral leaves little doubt in reaching the conclusion that the landowner has limited rights and access to the minerals.

How is it then that the mining operator enters into an agreement with the landowner and pays him according to the quantity of minerals removed?

The landowner is not acting, *ex officio*, in a capacity as agent of the State, as there is no indication that the landowner is needed in any form or position as a representative of the State, nor is he officially appointment in such a position. The receipt from the mining operator is neither held by the landowner in a fiduciary capacity as part of the State’s arrangement to manage the mining operation nor is he acting as intermediary between State and operator. The money received by the landowner is for his benefit and he is not a mere facilitator between the mining operator and another body or person.

## 5.5 Conclusion:

The introduction of the MPRDA changed the characteristics of the relationship between the role-players involved in the mining endeavour, as can be seen from para 5.2, when the State became custodian over all minerals in the Republic. Paragraph 5.2 discussed this concept, the ownership over minerals, along with the incurrance of a royalty payment obligation, as the most prominent changes brought about by the MPRDA.

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<sup>87</sup> Mineral and Petroleum Resources Development Act 28 OF 2002, Section 3(1)

Although the paragraph highlights the introduction of these two factors as significant changes to the legislation, the section accentuates the sustained cash flow position between the parties on a basis similar to what we see from before the changes in legislation. This reveals a position analogous to the ones we encounter in the cases studied in chapter two, but one very different from the position envisaged by the MPRDA, where the only monetary exchange predicted by the legislator originates from a compensation claim by the landowner against the mining operator, see para 5.3. The basis currently used for calculating the payment between the parties, according to para 5.3, remains the quantity of mining material removed, and the payment interval remains periodic (monthly in most cases), although the MPRDA contains no provision to support this type of commercial relationship.

The discussion from para 5.3 continues into para 5.4 and reaffirms the continued close relationship between landowner and mining operator, a position standing in contradiction of the legislative scope. The common practice is not aligned with the legislation, at least not as far as, considering the contractual significance of the relationship between the parties compared to the indistinct view of the MPRDA regarding their lack of interdependency. Para 5.4 elaborates on the position of the MPRDA which barely recognises the role of the landowner in the chain of importance. This view on importance is not shared by the mining operator in his dealings with the landowner as it is evident that the landowner dictates to a large extent the content of the agreement between the parties. The mining operator has not veered much from the recognised position previously held, in relation to the landowner, even though the role of the landowner is not significant according to the MPRDA.

Throughout this chapter there is clear indication that the common position between landowner and mining operator has not progressed along the same lines as the legislation. The result is that in practice we find a different setup to the one envisaged by the current legislation. This causes a predicament in the attempt to find some clarity on the matter. On the one hand we have the unanswered question namely, has the nature of the income undergone any change due to the introduction of the MPRDA, although the contractual relationship between the parties has not seen much

change? And secondly, what opportunities are presented to reclassify the income, as a result of the change in legislation, which the common practice has been reluctant to pursue? The result is two questions that are in need of clarification and the one may influence the other significantly.

The search to provide some clarification on these two topics stands at the core of this research paper as it is becoming increasingly difficult to answer to the one without considering the other. We started off with the common law position relating to the issue of classification of the income and progressed to include the changing legislation as a second opportunity to readdress the status quo. The following chapter, which will serve as the final chapter, will focus on discussing the opportunities presented by the change in legislation, in an endeavour to shed some new light on this now somewhat outdated common law position.

## CHAPTER 6: WHAT IS THE EFFECT OF RECENT HISTORY ON THE CLASSIFICATION OF RECEIPTS FROM MINING OPERATORS WITHIN THE HANDS OF LANDOWNERS?

### 6.1 Introduction:

The focus of this research paper has its main aim that of addressing the issue relating to the classification of receipts by landowners from payments made by mining operators who extract minerals from the land. In an attempt to get a clearer understanding of the forces that influence the position of the receipts, we are confronted with two key issues, namely:

(1) the relevance of the common law position pertaining to transactions of this nature;

(review of the Chapter 2 cases)

and

(2) the effect, if any, brought on by the introduction of new legislation pertaining to the mining industry, in the form of the MPRDA.

(quasi expropriation or the effect of the changes in legislation)

The application of the common law principles is questioned in light of the position the parties hold in relation to mining legislation. There is reason to believe that the position of the landowner has been significantly altered by either the introduction of the new legislation or consequently, as part of the reassessment of his position due to the changes. In the Supreme Court case between the “Minister of Minerals and Energy” (the Minister) and “Agri South Africa”, with the “Centre for Applied Legal Studies” as Amicus Curiae<sup>88</sup>, Agri SA challenge the possibility that expropriation of

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<sup>88</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* (458/11) [2012] ZASCA 93 (31 May 2012); Supreme Court of Appeal of South Africa.

mineral rights was brought on by the legislative intervention of the MPRDA and resulted in the expropriation of the common law rights that existed before it came into effect. An extension of this test case was whether there is an entitlement for compensation in terms of item 12(1) of Schedule II to the MPRDA. The case was reviewed by the “Constitutional Court<sup>89</sup>” on appeal by “Agri South Africa”, who dismissed the appeal and upheld the judgement of the “Supreme Court”.

The issue of expropriation is instrumental in the pursuit of clarification in this study and this case, along with its appeal case, provide valuable insights into the historical and current relationship between landowner and their access to minerals on their land under the laws of South Africa.

A close examination of the cases on expropriation is not only significant in relation to the topic of expropriation and compensation; but it also addresses the affiliation between landowner and related mineral rights with a historic view. It further elaborates on the real rights pertaining to unmined minerals and the effect of legislative changes. This apparent connection between landowner and minerals, or lack thereof, may be significant in considering the nature of the receipts.

## **6.2 The effects of the MPRDA coming into existence:**

Chapter 4 discussed the history of mining law in South Africa, in para 4.2. The chapter continued to include the 2002 promulgation of the MPRDA in para 4.3 and in para 4.4 the impact of the MPRDA on the mineral rights of landowners were alluded to in brief discussion. The chapter describes the shift of exercisable power over mineral rights, from the landowner to the state. In previous recordings of the legislation governing the industry of mining, the landowner had the prevailing power over the minerals trapped beneath the surface on their land, these powers were reserved by the state in legislative changes and are no longer available to owners of land to exercise independently.

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<sup>89</sup> *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; Constitutional Court of South Africa.



To better understand the shift in mineral right possession, brought on by the MPRDA, an adaptation of the judgements delivered in the case of *Agri SA vs the Minister of Minerals and Energy* in the Supreme Court<sup>90</sup> and the appeal case in the Constitutional Court<sup>91</sup> are necessary.

When *Agri South Africa*<sup>92</sup> (*Agri SA*) took the test case to court, involving the then Minister for Minerals and Energy<sup>93</sup> and the interpretation of the MPRDA, the subject of the matter was aimed at “determining whether the MPRDA expropriated rights that existed prior to its coming into force”<sup>94</sup>. The Applicant in the case did not specify the mineral in question nor did they seek to distinguish the position of the concerned party or the rights so affected from any other case involving mining<sup>95</sup>.

JA Wallis is quoted as saying: “It does not distinguish between precious metals and base metals, or between these and other forms of minerals, such as sand, stone or clay, precious stones, other gemstones and mineral oils. Nor does it distinguish between used and unused rights or between rights that were not separated from the land to which they related and rights that were so separated. To illustrate the breadth of the argument it was argued that the MPRDA effected an expropriation of the rights enjoyed by giant mining houses just as much as it had expropriated the unexploited mineral rights of farmers in rural areas.” From this extract we accept that the main focus of this study is accommodated in this broad elaboration of the scope of this test case, namely: Landowners in the form of farm owners extracting sand as the base mineral from their lands.

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<sup>90</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* (458/11) [2012] ZASCA 93 (31 May 2012); Supreme Court of Appeal of South Africa.

<sup>91</sup> *Agri South Africa v Minister for Minerals and Energy (CCT 51/12)* [2013] ZACC 9; Constitutional Court of South Africa.

<sup>92</sup> An Association not for gain incorporated in terms of section 21 of the Companies Act 61 of 1973 (Companies Act).

<sup>93</sup> Now the Minister for Mineral Resources.

<sup>94</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* (458/11) [2012] ZASCA 93 (31 May 2012); Supreme Court of Appeal of South Africa. Para [1]

<sup>95</sup> *Ibid* Para [3]

The test case attempts to answer the question whether “the MPRDA expropriate all mineral rights in South Africa?<sup>96</sup>” The question of expropriation is not part of this study, but in the attempt to address the case before them, the court a quo along with the Constitutional Court, delivers a judgement that encapsulates the position of mineral rights and the position of landowners in relation to these rights. These are fundamental aspects of the search to determine the position of income generated from the trade in these commodities.

Chief Justice Mogoeng reaffirms the common law relationship between landowner and mineral rights, when he sketches the background in delivering his judgement in the Constitutional Court: “Under common law a landowner owns everything above and below the land, including minerals.<sup>97</sup> One of the incidents of landownership was the entitlement to search for, mine and dispose of minerals, for own account.<sup>98</sup> As with most rights in property, it was exclusive and could not be appropriated by third parties for their use, benefit or enjoyment without the owner’s consent.”<sup>99</sup> As far as the exercise of power over mineral rights is concerned, this position of the common law has never been challenged to such an extent that the influence thereof is worth noticing in this study. The thread the common law follows is upheld by the Supreme Court where judge Wallis, in para 33, refers back to the origin under Roman Dutch Law: “In general the owners of property are free to do with it what they wish. That is the foundation for the view that as a matter of common law the right to mine vests in the owner of the land. Professor Badenhorst identifies the entitlement to exploit the minerals in, on and under the land as being one of the entitlements arising from ownership of land.<sup>100</sup>”

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<sup>96</sup> Ibid Para [4]

<sup>97</sup> See *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) (*Anglo*) at para 16; *Union Government (Minister of Railways and Harbours) v Marais and Others* 1920 AD 240 at 246; *Rocher v Registrar of Deeds* 1911 TPD 311 at 315 and Mostert *Mineral Law: Principles & Policies in Perspective* (Juta & Co Ltd, Cape Town 2012) at 7.

<sup>98</sup> Badenhorst “Ownership of minerals in situ in South Africa: Australian darning to the rescue” (2010) 127 *SALJ* 646 at 649.

<sup>99</sup> *Agri South Africa v Minister for Minerals and Energy (CCT 51/12)* [2013] ZACC 9; CONSTITUTIONAL COURT OF SOUTH AFRICA. Para[7]

<sup>100</sup> P J Badenhorst ‘The re-vesting of state entitlements to exploit minerals in South Africa: privatisation or deregulation?’ 1991 *TSAR* 113 at 114. In accordance with the school of thought in property law that there cannot be a right in a right, he eschews the use of the expression ‘rights’ in relation to the things that the owner may do

Under the auspices of the common law rule, landowners were entitled to permit third parties to prospect or mine on their land<sup>101</sup>, as they were the holders of the rights to the minerals. The Minerals Act<sup>102</sup> (Minerals Act) acknowledges the landowner as the mineral right holder, where legislation define the “holder” of the mineral right, as:

“the owner of such land: [p]rovided that -

(1) if the right to such mineral or an undivided share therein has been severed from the ownership of the land concerned, the person in whose name such right or an undivided share therein is registered in the deeds office concerned, either by means of a separate deed or by means of a reservation in the title deed of the land concerned”<sup>103</sup>

This section of the Minerals Act defines the landowner as the holder of the mineral right, unless it is severed and assigned by way of deed registration to a third party. This separation of mineral right from landownership was a development of the law that bestowed upon the landowner the privilege to sever the right to the mineral from the dominium of the land. It brought about a new commodity, a real right in the form of a mineral right. They have enjoyed this status of real rights for a substantial period in time before the MPRDA came into existence in 2002. In delivering a brief overview of the history of mining rights in South Africa, judge Wallis makes the following remark: “Thereafter, in *Van Vuren v Registrar of Deeds*,<sup>104</sup> Innes CJ, having pointed out that the rights so registered were neither personal nor praedial servitudes, described them as quasi-servitudes. Separate registration of any mining right was now required and they were effectively characterised as real rights.”<sup>105</sup>

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preferring the expression ‘entitlements’. The difficulty with this approach is that when this entitlement is severed from the land it becomes an independent real right, which suggests that its legal character is different prior to severance than after, a notion that poses considerable conceptual difficulties.

<sup>101</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* (458/11) [2012] ZASCA 93 (31 May 2012); Supreme Court of Appeal of South Africa. Para [33]

<sup>102</sup> Minerals Act 50, 1991

<sup>103</sup> Minerals Act 50, 1991 section 1(ix)(a)(i)

<sup>104</sup> *Van Vuren v Registrar of Deeds* 1907 TS 289 at 295.

<sup>105</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* (458/11) [2012] ZASCA 93 (31 May 2012); Supreme Court of Appeal of South Africa. Para [51]

The origin that initiated the severance that occurred between mineral rights and land ownership to be separately held is still somewhat uncertain, as we find contradictory views expressed in the Supreme Court and Constitutional Court cases. The contradiction does not alter the position of the landowner post MPRDA coming into effect, but it does, to an extent, taint the position before its introduction.

In the Supreme Court, Judge Wallis includes paragraph 60 to express his view: “This tendency to obscure or overlook the key role of legislation in the development of our law of mineral rights is well illustrated by the analysis in the leading textbook on mining law in regard to the effect of s 2(1) of the 1967 Act. That section dealt clearly and explicitly with the right to mine in relation to precious minerals (ss 1(a)) and base minerals (ss 1(b)). In doing so it followed the example of the 1908 Gold Law. There seems little reason not to view this as a statutory allocation of the right to mine in accordance with government policy of the day. One cannot view ss 1(a) as taking away the common law rights of landowners. That would be inconsistent with over a century of history reflecting the approach of successive governments in the different parts of the country that it was for government, not landowners, to determine who should exercise the right to mine, at least in regard to precious stones, precious metals, natural oil and uranium and in some instances more. Insofar as there can be any question of taking away rights vested in landowners by the *cuius et solum* principle, that had occurred many years before when mineral rights became capable of severance from ownership of the land, and it was never reversed. Section 2(1)(a) clearly retained the position in regard to precious metals and natural oil that the right to mine was vested in the State and was allocated by statute.”<sup>106</sup>

The learned judge expresses the view that the common law rights which landowners enjoyed, had been removed by statutory allocation, brought about in the legislation of the early 20<sup>th</sup> century. His view on landowners’ rights vested in the *cuius et solum* principle being taken away, was that it could be traced back to the Gold Law of 1908. The view he takes on this topic is somewhat obscuring the meaning and the

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<sup>106</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* (458/11) [2012] ZASCA 93 (31 May 2012); Supreme Court of Appeal of South Africa. Para [60]

implication of section 1(ix)(a)(i) of the Minerals Act quoted earlier. Chief Justice Mogoeng follows section 1(ix)(a)(i) of the Minerals Act up with: “It follows from this definition that mineral rights could still be held by a landowner under the Minerals Act. Since this right was capable of being severed from landownership, mineral rights or an undivided share therein would, in circumstances where severance had taken place, be registered in the Deeds Office, in the name of the holder.”<sup>107</sup>

Chief Justice Mogoeng’s allusion to this section and saying that mineral right “could still be held” by landowners is indicative of the view that the state was not the absolute holder of these rights. Although his views raises enough question to say that there is scope for uncertainty, the fact that the section actually reads that the “holder” of the mineral right is “the owner of such land” and that it continues to distinguish this position from other forms of ownership in “[p]rovided that – (i) if the right ... has been severed from the ownership of the land concerned, the person in whose name such right ... is registered” is further support of the landowners’ claim that they are the actual holders of the mineral rights.

Chief Justice Mogoeng continues his explanation of the significance of being the holder of the mineral rights and its benefits, when he refers to the Minerals Act in quoting “the right to enter upon such land or the land on which such tailings are situated, as the case may be, together with such persons, plant or equipment as may be required for purposes of prospecting or mining and to prospect and mine for such mineral on or in such land or tailings, as the case may be, and to dispose thereof.” It is evident from these sections quoted from the two courts that a position of absolute clarity will not be obtained easily. Fortunately, for the sake of this study, we do not have to provide such clarity as the focus of this study falls on the mechanics employed by the persons involved in the dealings that relied on this legislative support.

This study relies on support from the compromise acknowledged in the Constitutional Court ruling. The Constitutional Court decision allows the concession made by the

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<sup>107</sup> *Agri South Africa v Minister for Minerals and Energy (CCT 51/12)* [2013] ZACC 9; CONSTITUTIONAL COURT OF SOUTH AFRICA. Para[12]

Minister where he “agrees that the holders were deprived of their mineral rights but denies that the state acquired those rights.”<sup>108</sup> This deprivation of the holder’s right, this study argues, gives rise to the analogy that the position of the landowner has been altered to such an extent that previous common law principles are obsolete in applying their principles to classify income in the hands of landowners from transactions originating from these mineral rights. The position held prior to the deprivation occurring and the position thereafter can simply not be viewed as the same.

The word deprive is awarded no additional meaning but its common dictionary meaning: “to take something, especially something necessary or pleasant, away from someone”<sup>109</sup>. What exactly was deprived according to the Constitutional Court? Chief Justice Mogoeng included the following admission in passing his judgement. “It follows that the MPRDA, which is a law of general application, had the effect of depriving Sebenza, and a similarly-positioned holder of a pre-existing mineral right, of elements of that right, as correctly conceded by the Minister. It is common cause between the parties that the deprivation was not arbitrary, and this is correct considering both the objects of the MPRDA and the transitional arrangements.”<sup>110</sup> Accordingly, the deprivation was of a “pre-existing mineral right”. It is this same “pre-existing mineral right” which is used by landowners to negotiate a deal with mining operators that stands at the heart of this study. To conclude this argument, the analogy followed by Chief Justice Mogoeng is adopted: “It would thus be understood that prior to the commencement of the MPRDA the state had the power to regulate the exploitation of minerals owned by either the landowner or, in the case of minerals notionally “separated” from landownership, by the owner of minerals.”<sup>111</sup> It is gathered that the state had the “regulatory power” to regulate the owners’ exploitation of the mineral, but not the authority to award or allocate the ownership

<sup>108</sup> *Agri South Africa v Minister for Minerals and Energy (CCT 51/12)* [2013] ZACC 9; CONSTITUTIONAL COURT OF SOUTH AFRICA. Para[32]

<sup>109</sup> The Cambridge Dictionary, [online]. Deprive. Available at: <https://dictionary.cambridge.org/dictionary/english/deprive> [Accessed August 2018]

<sup>110</sup> *Agri South Africa v Minister for Minerals and Energy (CCT 51/12)* [2013] ZACC 9; CONSTITUTIONAL COURT OF SOUTH AFRICA. Para[53]

<sup>111</sup> *Agri South Africa v Minister for Minerals and Energy (CCT 51/12)* [2013] ZACC 9; CONSTITUTIONAL COURT OF SOUTH AFRICA. Para[39]

itself. The state's regulatory authority had the measure of power to dictate when and how minerals may be exploited, but not by whom, as ownership of minerals still attached to either the landowner, or if separated from the ground, the mineral rights holder<sup>112</sup>. Para 40 is quoted as saying: "When the state assumed regulatory authority, it could permit only mineral owners to extract. Where ownership of minerals, separated or not, once gave unregulated entitlement to exploit, now the state has the authority to decide when and how minerals may be exploited."<sup>113</sup> The judgement continues to explain the pre 2002 position and also addresses the issue of royalty payments and the state's inability to enforce the exploitation of privately owned minerals, as the state "held no power of compulsion to enforce the exploitation of privately owned minerals"<sup>114</sup>.

The admission that "the legal position under the Minerals Act was that the holder's ability to sterilise or not to exploit the minerals could only be extinguished by expropriation and payment of compensation. That, on its own, appears to be a complete answer to the notion that mineral ownership either had no independent existence or independent value<sup>115</sup>" is clear evidence of the monetary value which mineral rights presented to landowners as mineral right holders. This value locked up in providing access to the minerals, is the key to understand the relationship between landowner and mining operator and to grasp the reasoning for the payments that flowed from mining operator to landowner prior to the MPRDA. The mining operator had to buy the landowners consent and ultimately his continued support of the mining endeavours.

There remain strong arguments to be presented to clarify the somewhat unclear position on mineral rights before 2002 and the introduction of the MPRDA, but little argument exists thereafter. The MPRDA removes all uncertainty with the inclusion of its section 4(2) and the wording "Whenever the common law is inconsistent with the

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<sup>112</sup> *Ibid.* Para[40]

<sup>113</sup> *Ibid.* Para[40]

<sup>114</sup> *Ibid.* Para[41]

<sup>115</sup> *Ibid.* Para[43]

MPRDA, the latter prevails.”<sup>116</sup> The deathblow for landowners can be attributed to the summary of their position, as caused by the MPRDA coming into affect and described by Judge Froneman in his support of the verdict in the Constitutional Court: “The MPRDA abolished private ownership of minerals, based either on land ownership or the holding of severed real rights to the minerals, which existed under the mining law dispensation enacted prior to the Constitution. In its stead the MPRDA introduced a mineral law dispensation in terms of which the state became the custodian of mineral resources with the power to allow exploitative access to those resources to all the people of South Africa.”<sup>117</sup>

In an attempt to disclose the full effect of the MPRDA, Judge Froneman explains it as follows: “Previously, private owners of minerals had the power or competence to decide whether to exploit minerals they owned and to whom they could give their exploitation rights. It was an incidence of ownership. Now the state has that power or competence by virtue of its custodianship of mineral resources under the MPRDA. It may not have acquired the right to exploit the minerals, but it has acquired the power to allocate and dispose of the exploitation rights. What private owners of minerals previously had in this regard, the state now has.”<sup>118</sup> He acknowledges that private owners had the power and competence to award exploitation rights to whom they saw fit. This study encompasses the view that it is this very power which was bestowed on landowner, in their capacity as mineral right holders, which awarded them the opportunity to financially benefit from allowing others (mining operators) to access the riches of the minerals on their land. The continued argument is that the introduction of the MPRDA has eradicated this privilege enjoyed by the landowners. It has altered the view of the common law in relation to the dealings historically held between the parties.

This altered view regarding access to minerals and the direct link that existing between landownership and the holding of mineral rights are the main contingencies

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<sup>116</sup> Mineral and Petroleum Resources Development Act 28 OF 2002, Section 4(2)

<sup>117</sup> *Agri South Africa v Minister for Minerals and Energy (CCT 51/12)* [2013] ZACC 9; CONSTITUTIONAL COURT OF SOUTH AFRICA. Para[80]

<sup>118</sup> *Ibid.* Para[81]



to argue that the MPRDA has changed the landscape to such an extent that common law principles that existed before its coming into effect are no longer absolute authority and have to a certain degree become obsolete. Therefore, the reliance on the cases presented in Chapter 2 and the principles gathered from their judgements can no longer be retained as being authoritative.

### **6.3 Conclusion:**

The objectives and approach in Chapter 1, defined this dissertation as set out to: Examine the classification of receipts by landowners from mining operations on the basis of reputed common law principles. There has been a long history where landowners, in many cases farmers, allowed onto their pastures the likes of mining concessions. These mining companies would carry out all the necessary activities to severe minerals from the land and to sell them. The farmer on the other hand would receive from the relationship a royalty or base payment in the form of a monthly consideration calculated on the premise of minerals removed from the land or sold from the land, in the preceding period. It is this form of receipt by landowners that stand as the focus of this study. Part of the historic battle between capital and revenue classification by the authority, this transaction is one reliant on common law findings and principles, rather than trite law. The common law position has remained rather uncontested in the recent past, due to adverse findings for taxpayers challenging the authorities in court, since the 1980's. The industry has however not remained static since these findings and introduction of tax law and to a greater extend mining specific law, has brought with it the possibility of a review of the common law standing on the topic. It is the core undertaking of this dissertation, to infuse a rejuvenated zest to challenge the status quo and to find alternative ways to assist taxpayers in applying the ambit of the tax laws to allow for beneficial taxing of receipts in circumstances that warrant such treatment.

### 6.3.1 Chapter 2, Principles laid down in cases past:

The main objective for including this chapter is to serve as a measure of historic review and an attempt to ring fence the challenge. A revisit to some of the leading cases in the process of establishing the common law position regarding the topic, were essential in providing foundation to this study. The cases under review had disparate views forming the foundation of their arguments, ranging from “fructus vs corpus” in *van Blerk*<sup>119</sup> to “scheme of profit making” in *Samril Investments*<sup>120</sup> and finally a dual argument in *Ernst Bester*<sup>121</sup> firstly the issue of “productively employing a capital asset” and continuing to include reasoning on “trading stock”. The inclusion of these cases is evident to the range of alternative challenges that have been lodged against the initial classification decisions by the authorities.

### 6.3.2 Chapter 3, Changes in tax legislation:

This study encompasses the common understanding that, the principles derived from the selected cases relate unquestionably to the relevant facts pertaining to each case and the incumbent laws at the time of their formation. It was therefore an imperative part of this research to investigate whether these principles remained relevant, considering the changes both in industry specific and tax legislation.

The main introduction to tax law since the establishment of the common law principles in the cases from Chapter 2, was that of Capital Gains Tax (CGT). Although the view in Chapter 2 was that the inclusion of CGT did not have any material effect on the outcome of the revenue vs capital nature of the transactions, it had a significant impact on the tax landscape, to such an extent that it is in the least worth noticing.

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<sup>119</sup> *Commissioner for South African Revenue Service v Van Blerk* [2000] 62 SATC 131 (Cape of Good Hope Provincial Division of the Supreme Court of South Africa)

<sup>120</sup> *Samril Investments (Pty) Ltd v Commissioner for South African Revenue Service* [2002] 65 SATC 1 (Supreme Court of Appeal of South Africa)

<sup>121</sup> *Ernst Bester Trust v Commissioner for South African Revenue Service*. [2008] 70 SATC 151 (Supreme Court of Appeal of South Africa)

### **6.3.3 Chapter 4, Introduction of the mineral and petroleum resources development act:**

This chapter follows on from the previous chapter to address the altered landscape in which the common law has to be viewed. This chapter provides a brief history on the ownership of mineral rights in South Africa ranging back to the Roman-Dutch legal system from 1652 up until the introduction of the Mineral and Petroleum Resources Development Act (MPRDA) in 2002. It is important to recognise the altered mineral dispensation over time and the effect it has on the question of mineral right ownership.

It is during this chapter, that the magnitude in effect which the MPRDA has brought about manifests itself. For the first time the industry encounters a situation where legislation comprises a “use it or lose it” principle, a consideration which had been absent from the mineral dispensation of preceding era<sup>122</sup>. This indulgence is supported by specific inclusions in the MPRDA to support third party’s challenges to be granted the opportunity to obtain mineral rights over another’s property<sup>123</sup>.

From this point forward there is a clear shift in focus on the effects of the MPRDA coming into existence.

### **6.3.4 Chapter 5, The basis for taxing receipts from mining operators in the hands of landowners, post 2002:**

Chapter 5 continues from the position the industry is in after the promulgation of the MPRDA. Although legislation is dated as 2002, the new act was only promulgated in 2004.

The chapter includes an illustration on the transformation to the relationship between the role-players in the industry, as envisaged by the MPRDA. The altered association between the parties involved has led to the MPRDA providing limited grounds for money flowing between landowner and mining operator. The justification for these

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<sup>122</sup> Ibid

<sup>123</sup> Lawyer.co.za; FAQ: Mineral Law; [online] Available at: <http://www.lawyer.co.za/index.php/mineral-law#no1> ; Accessed [14 June 2016]

exchanges is found in Section 54 of the MPRDA, and is limited to situations where there is a compensation claim by a landowner against a mining operator. The act does not address other means of money exchange between the two parties, but for the compensation clause.

There are however certain situations where a royalty remains payable, but to the State. The conditions are set out in section 11 of the MPRDA and it must carry the favourable consideration of the Minister. These scenarios are particularly found in situations where the origin of these payments emanates from a period prior to the MPRDA coming into effect<sup>124</sup>. These cases are limited to their specific scope and do not concern this study.

Added to the limited mention of monetary exchange between the relevant parties, the MPRDA includes an additional section on royalty payments. According to section 3(2)(b) of the MPRDA the Minister of Minerals and Energy, along with the Finance Minister, is given the authority to levy royalties, payable to the State on extracted minerals, in terms of an Act of Parliament. The levying of royalties is regulated through the powers vested in the Mineral and Petroleum Resources Royalty Act<sup>125</sup>, 2008 as well as the Mineral and Petroleum Resources Royalty (Administration) Act, 2008<sup>126</sup>, both of these acts are administered by SARS.<sup>127</sup>

All considered, these terms for payment do not address or elaborate on the topic of this study but merely serve to emphasize the limited inclusion of payments terms in the MPRDA.

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<sup>124</sup> Mineral and Petroleum Resources Development Act 28 OF 2002, Section 11

<sup>125</sup> The South African Revenue Service, (2016). *Mineral And Petroleum Resources Royalty*. Available at: <http://www.sars.gov.za/TaxTypes/MPRR/Pages/default.aspx> [Accessed: 04 November 2017]

<sup>126</sup> The South African Revenue Service, (2016). *Mineral And Petroleum Resources Royalty*. Available at: <http://www.sars.gov.za/TaxTypes/MPRR/Pages/default.aspx> [Accessed: 06 November 2017]

<sup>127</sup> Ibid

### 6.3.5 Chapter 6, What is the effect of recent history on the classification of receipts from mining operators within the hands of landowners:

Leading up to the start of chapter 6, the study culminates in the following two questions; (1) the relevance of the common law position pertaining to transactions of a similar nature; and (2) the effect, if any, introduced by legislative changes to the mining industry, in the form of the MPRDA.

The final chapter places extensive focus on the arguments presented and the findings in two recent court cases challenging the ramifications to the role-players as a result of the MPRDA. The two cases namely *Minister of Minerals and Energy v Agri South Africa*<sup>128</sup> and the appeal case, *Agri South Africa & Minister of Minerals and Energy*<sup>129</sup> were heard in the Supreme Court and Constitutional Court respectively, giving them extensive common law authority.

The detailed analysis of the Agri South Africa cases serves to draw the link between the two fundamental questions, closer. The result of this study is a situation where the relevance of the common law (question 1) is questioned to such an extent, by the effect of the MPRDA (question 2), that you can no longer rely exclusively on the existing common law principles when challenging the outcome of similar scenarios.

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<sup>128</sup> *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)* (458/11) [2012] ZASCA 93 (31 May 2012); Supreme Court of Appeal of South Africa.

<sup>129</sup> *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; CONSTITUTIONAL COURT OF SOUTH AFRICA.

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